

DOCKET



SUPREME COURT

OF THE UNITED STATES

No. 11-820

Title Roselva Chaidez, Petitioner
 v.
 United States
Docketed December 29, 2011
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-3623)
Decision Date: August 23, 2011
Rehearing Denied: November 30, 2011

Questions Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Dec 23 2011 Petition for a writ of certiorari filed. (Response due January 30, 2012)  
Jan 25 2012 Order extending time to file response to petition to and including February 29, 2012  
Jan 30 2012 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed  
Jan 30 2012 Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)  
Feb 23 2012 Order further extending time to file response to petition to and including March 30, 2012  
Mar 30 2012 Brief of respondent United States filed.  
Apr 11 2012 DISTRIBUTED for Conference of April 27, 2012  
Apr 11 2012 Reply of petitioner Roselva Chaidez filed. (Distributed)  
Apr 30 2012 Petition GRANTED  
Jun 5 2012 The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 16, 2012  
Jun 5 2012 The time to file respondent's brief on the merits is extended to and including September 14, 2012  
Jun 15 2012 Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for the petitioner.  
Jul 2 2012 Motion to dispense with printing the joint appendix filed by petitioner Roselva Chaidez.  
Jul 16 2012 Brief of petitioner Roselva Chaidez filed.  
Jul 23 2012 Motion to dispense with printing the joint appendix filed by petitioner GRANTED.  
Jul 23 2012 SET FOR ARGUMENT ON Tuesday, October 30, 2012  
Jul 23 2012 Brief amici curiae of Active and Former State and Federal Prosecutors filed.  
Jul 23 2012 Brief amicus curiae of National Association of Federal Defenders filed.  
Jul 23 2012 Brief amici curiae of Habeas Scholars and Constitutional Accountability Center filed.  
Jul 23 2012 Brief amicus curiae of American Immigration Lawyers Association filed.  
Jul 23 2012 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed



Aug 2 2012 CIRCULATED

Aug 7 2012 Record from U.S.C.A. to 7th Circuit is electronic.

Aug 15 2012 Record from U.S.D.C. for Northern District of Illinois is electronic and is available on PACER. There are sealed documents in this record.

Sep 14 2012 Brief of respondent United States filed. (Distributed)

Sep 21 2012 Brief amici curiae of New Jersey, et al. filed. (Distributed)

Sep 21 2012 Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)

Oct 15 2012 Reply of petitioner Roselva Chadez filed. (Distributed)

Nov 1 2012 Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.

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**PETITION  
FOR  
WRIT OF  
CERTIORARI**

IN THE  
**Supreme Court of the United States**Supreme Court, U.S.  
FILED

DEC 23 2011

OFFICE OF THE CLERK

ROSELVA CHAIDEZ, \*

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

**PETITION FOR A WRIT OF CERTIORARI**

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Charles Roth  
Claudia Valenzuela  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle Street  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave., N.W.  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question presented is whether *Padilla* applies to persons whose convictions became final before its announcement.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Roselva Chaidez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 655 F.3d 684. Two opinions of the United States District Court for the Northern District of Illinois are relevant here. The first (Pet. App. 31a) is published at 730 F. Supp. 2d 896. The second (Pet. App. 39a) is unpublished, but available on Westlaw at 2010 WL 3979664.

### **JURISDICTION**

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A timely petition for rehearing was denied on November 30, 2011. Pet. App. 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL PROVISION**

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that a criminal defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when her lawyer fails to advise her that a guilty plea may trigger virtually automatic deportation. This case presents the question – over which the circuits are openly divided – whether *Padilla* applies retroactively to persons whose convictions were final before its announcement.

1. This Court has long recognized that the right to counsel is “the right to the effective assistance of counsel,” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), and that this right applies at trial as well as during plea negotiations, see *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court articulated a two-prong test for assessing when “counsel’s assistance was so defective as to require reversal of a conviction.” *Id.* at 687. First, “the defendant must show that counsel’s performance was deficient.” *Id.* Second, the defendant must show that he suffered prejudice, *id.*, which, in the context of having entered a guilty plea, means that “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial,” *Lockhart*, 474 U.S. at 59.

With respect to the deficient performance prong, this Court has explained that the Sixth Amendment does not “specify[] particular requirements of effective assistance,” but “relies instead on the legal profession’s maintenance of standards.” *Strickland*, 466 U.S. at 688. Thus, “[t]he proper measure of

attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

In the wake of dramatic changes to immigration law in the 1990s that, among other things, made deportation virtually automatic for anyone convicted of crimes classified as "aggravated felonies," *see, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii), and which substantially expanded the list of such offenses, legal authorities of every persuasion recognized that criminal defense lawyers must advise clients of the immigration consequences of guilty pleas. *See, e.g.*, *ABA Standards for Criminal Justice, Pleas of Guilty* 116 (3d ed. 1999); Nat'l Legal Aid and Defender Ass'n, *Performance Guidelines for Criminal Representation* § 6.2 (1995); 2 U.S. Dep't of Justice, Office of Justice Programs, *Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance* D10, H8-H9, J8 (2000). Furthermore, because criminal conduct often provides the basis for multiple charges, only some of which are aggravated felonies or otherwise constitute removable offenses, professional norms required lawyers to pursue several options when representing clients charged with offenses that trigger deportation. Lawyers could (and regularly did) negotiate guilty pleas to alternate, nondeportable offenses; to lesser degrees of the same offenses; or to charged offenses without noting in records relating to the conviction extra factual allegations beyond the offense's elements that, if true, could trigger deportation. *See, e.g.*, 3 Bender's *Criminal Defense Techniques* § 60A.07 (1992); Norton Tooby, *California Post-Conviction Relief for Immigrants* § 8.48 (2009 ed.).



In *Padilla*, an individual who had pleaded guilty to a state offense sought post-conviction relief on the ground that his counsel's failure to advise him that his guilty plea would subject him to virtually automatic deportation constituted "deficient performance" under *Strickland*. This Court held that it did, pointing to the "prevailing professional norms" and "the practice and expectations of the legal community" at the time of the plea. *Padilla*, 130 S. Ct. at 1482 (citing *Strickland*, 466 U.S. at 688).

2. Petitioner Roselva Chaidez was born in Mexico but has lived in the United States since the 1970s. She has been a lawful permanent resident since 1977 and resides in Chicago with her three U.S.-citizen children and two U.S.-citizen grandchildren. Pet. App. 31a.

Several years ago, Chaidez became involved in an insurance scheme. As the Government explained, she was "not aware of the specifics of the scheme," but others persuaded her to falsely claim to have been a passenger in a car involved in a collision. Plea Hr'g Tr. 16:5, Dec. 3, 2003. Chaidez received \$1,200 for her minor role. According to the Government, however, the insurance company paid a total of \$26,000 to settle the claims that Chaidez and others made.

In 2003, the Government charged Chaidez with two counts of mail fraud for two separate mailings related to collecting her settlement. Since 1996, a federal statute has expressly classified "an[y] offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000" as an "aggravated felony." 8 U.S.C. § 1101(a)(43)(M)(i); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 321,

110 Stat. 3009-546, 3009-627 (amending definition of “aggravated felony” by lowering loss threshold for acts of “fraud or deceit” from \$200,000 to \$10,000).

By the time the Government indicted Chaidez, it had long been standard practice for attorneys to advise their clients of the immigration consequences of potential criminal convictions. Nonetheless, Chaidez’s counsel gave her no such advice. Pet. App. 36a. Nor did her counsel attempt to negotiate a plea agreement in which the stipulated loss for which she was responsible was below the \$10,000 threshold for aggravated felonies. Nor did her attorney consider whether Chaidez might have been able to plead guilty to a different offense that would not have triggered mandatory removal. Instead, the attorney simply recommended accepting the Government’s offer of a probationary sentence in exchange for her pleading guilty to the two counts and leaving it to the district court to determine the amount of loss and appropriate restitution.

It is undisputed that “had Chaidez known of the immigration consequences” of pleading guilty to fraud involving more than \$10,000, she would not have pleaded guilty under these circumstances. *Id.* 36a. Yet because her lawyer provided no such information, Chaidez followed her attorney’s recommendation and accepted the plea. After a hearing, the district court sentenced her to four years’ probation and ordered restitution in the amount of \$22,500. Her conviction became final in 2004. *Id.* 2a.

3. Having paid restitution and almost completed her probation, Chaidez applied in 2007 to obtain United States citizenship. *Id.* 32a. After questioning her about her fraud conviction, immigration



authorities initiated deportation proceedings against her. *Id.* 32a.

Shortly thereafter, Chaidez filed a petition in the U.S. District Court for the Northern District of Illinois for a writ of *coram nobis* under 28 U.S.C. § 1651(a), which “provides a method of collaterally attacking a criminal conviction when a defendant is not in custody.” Pet. App. 3a. Seeking to vacate her fraud conviction, Chaidez contended that her defense counsel rendered ineffective assistance by failing to advise her that her guilty plea would subject her to deportation.

While that petition was pending, this Court decided *Padilla*, making it clear that the Sixth Amendment basis for her argument is meritorious.

In order to determine whether *Padilla* applies to Chaidez’s case, the district court turned to the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).<sup>1</sup> Under *Teague*, a decision that merely applied an established rule to the facts of a particular case applies retroactively to already final

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<sup>1</sup> *Teague* itself involved collateral review of a state conviction. This Court has never held that *Teague*’s retroactivity framework extends to collateral review of federal convictions. See *Teague*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) (“The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners.”); *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008) (reserving the question “whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255”). But Seventh Circuit precedent holds that *Teague* applies to post-conviction challenges to federal as well as state convictions. See *Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994).

convictions. By contrast, save exceptions not relevant here, a rule of criminal procedure that “breaks new ground or imposes a new obligation on the States or the Federal Government” will not be given retroactive effect on collateral review. *Id.* at 301.

The district court concluded that the holding in *Padilla* was merely an application of *Strickland* to a new set of facts. Pet. App. 44a. It further supported this conclusion with the fact that Padilla himself had “brought a collateral challenge to his conviction.” *Id.* 48a. If “Chaidez’s claim [were] barred by *Teague*,” the court reasoned, “Padilla’s claim should have been barred as well.” *Id.* 48a-49a.

Following an evidentiary hearing on the facts, the district court confirmed that both prongs of the *Strickland* test were satisfied here. Chaidez’s attorney was ineffective because she failed to advise her of the immigration consequences of her plea. And that failure was prejudicial because Chaidez would not have accepted the Government’s offer had she been properly advised of the immigration consequences. *Id.* 36a. The court thus granted a writ of *coram nobis*, vacating Chaidez’s conviction.

4. The Government appealed, challenging only the district court’s holding that *Padilla* applies here. *Id.* 6a. While acknowledging that the Third Circuit and the Massachusetts Supreme Judicial Court had recently held – like the district court – that *Padilla* is retroactive, *id.* 6a, 11a (citing *United States v. Orocio*, 645 F.3d 630, 640-42 (3d Cir. 2011), and *Commonwealth v. Clarke*, 949 N.E.2d 892, 898 (Mass. 2011)), a divided panel of the Seventh Circuit disagreed with these holdings and reversed.

The majority did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did the majority dispute that “the application of *Strickland* to unique facts generally will not produce a new rule.” Pet. App. 15a; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same observation). But the majority “believe[d] *Padilla* to be the rare exception,” Pet. App. 15a-16a, owing to the judicial disagreement prior to *Padilla* and in *Padilla* itself over whether the Sixth Amendment should apply to advice regarding “collateral” consequences of guilty pleas. In particular, the concurrence and dissent in *Padilla* characterized certain aspects of the majority opinion as a substantial extension of existing precedent, and some lower courts had previously held that the Sixth Amendment did not cover failures to give advice concerning the “collateral” consequences of guilty pleas. *Id.* 8a-9a. Accordingly, the majority concluded that although the question was a “challenging” one, “the scales [tip] in favor of finding that *Padilla* is a new rule.” *Id.* 18a.

Judge Williams dissented. She emphasized that the test for whether a holding is a new rule remains whether the holding broke new ground; and that test is an objective one. That being so, she reasoned, the existence of conflicting authority prior to *Padilla* “cannot change” the decisive fact that “*the Supreme Court itself* ‘never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*.’” *Id.* 26a (emphasis added) (quoting *Padilla*, 130 S. Ct. at 1481). To the contrary, Judge Williams emphasized, this Court

recognized years before *Padilla* that, at least in the context of advice regarding deportation, “[p]reserving the client’s right to remain in the United States may be *more important* to the client than any potential jail sentence.” Pet. App. 23a (emphasis added) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)) (quotation marks omitted).

5. Citing Seventh Circuit Rule 40(e) – which provides that a panel opinion that would “create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear [the case] en banc” – the Seventh Circuit panel distributed the majority and dissenting opinions to the entire bench before publishing it. Over four dissenting votes, the court of appeals declined at that time to hear the case en banc. Pet. App. 1a n.1.

After the panel issued its decision, Chaidez requested rehearing en banc, urging the court of appeals to reconsider the issue. The Government opposed rehearing, contending, among other things, that no matter what the Seventh Circuit decided here, a circuit split would persist. The court of appeals refused to rehear the case. *Id.* 56a.

### REASONS FOR GRANTING THE WRIT

Federal and state courts are openly and intractably divided over whether this Court’s holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), applies retroactively to convictions that became final before its announcement. This Court should use this case to resolve that conflict. As the Government itself has explained, the question of *Padilla*’s retroactivity is one of “exceptional importance.” Gvt’s

Pet. for Reh'g En Banc 4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011). It also is outcome-determinative here, for it is undisputed that if *Padilla* applies to Chaidez's case, she is entitled to relief. Finally, the Seventh Circuit's holding that *Padilla* is not retroactive is incorrect.

# **I. Courts Are Intractably Divided Over Whether *Padilla* Applies Retroactively On Collateral Review.**

The retroactivity framework of *Teague v. Lane*, 489 U.S. 288 (1989), establishes a dichotomy. When one of this Court's criminal procedure decisions "dictate[s]" the result in a subsequent case, the holding in that subsequent case applies retroactively on collateral review. *Id.* at 301. By contrast, when this Court issues a ruling that "breaks new ground or imposes a new obligation on the States or the Federal Government," that "new rule" does not (save exceptions not relevant here) apply to challenges to convictions that became final before the holding's announcement. *Id.* And while the government in a habeas case can waive *Teague's* bar against retroactively applying "new rules," courts may also invoke it *sua sponte*. See *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Indeed, this Court stated in *Teague* itself that it should "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." 489 U.S. at 316; *see also Penry v. Lynaugh*, 492 U.S. 302, 350-51 (1989) (Scalia, J., concurring in part and dissenting in part) ("*Teague* . . . precludes collateral relief that would establish a new rule.").



In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), a state prisoner sought state post-conviction relief on the ground that his attorney had failed to advise him that pleading guilty to a certain criminal charge would subject him to virtually automatic deportation. In order to resolve that claim, this Court turned to its prior decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland*, the Court explained, had long ago established that a criminal defendant receives ineffective assistance of counsel when his attorney's performance falls below a reasonable level of competence, as measured by "prevailing professional norms." *Id.* at 688. Applying that established standard to the facts before it, this Court held that the failure of Padilla's counsel to advise him of the deportation consequences of his plea constituted ineffective assistance of counsel because prevailing norms required such advice. Although Kentucky follows *Teague's* prohibition against granting such relief when doing so would establish a new rule, see *Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), this Court did not suggest that ruling in Padilla's favor raised any retroactivity issue.

In the wake of *Padilla*, federal and state courts have struggled to determine whether – in the words of *Teague* – *Padilla* was "merely an application of the principle that governed" *Strickland*, or whether it is somehow a "new rule" that applies retroactively only to Padilla himself. 489 U.S. at 307 (quotation marks and citation omitted). Courts are now squarely and openly divided over the issue.

1. The Seventh and Tenth Circuits have held that *Padilla* does not apply retroactively on collateral review because it is a new rule under *Teague*. In its

divided decision here, the Seventh Circuit held that the “scales [tipped] in favor of finding that *Padilla* announced a new rule” because it marked the first time that this Court had applied *Strickland* in the specific context of “advice about matters not directly related to the[] client’s criminal prosecution.” Pet. App. 16a. In so holding, the Seventh Circuit refused to ascribe any “significance to *Padilla*’s procedural posture,” asserting it was “more likely that th[is] Court considered *Teague* to be waived, than that it silently engaged in a retroactivity analysis.” *Id.* 17a-18a.

While likewise calling the issue a “close[] question,” the Tenth Circuit has also held that “*Padilla* is a new rule of constitutional law” within the meaning of *Teague*. *United States v. Chang Hong*, \_\_\_ F.3d \_\_\_, 2011 WL 3805763, at \*3 (10th Cir. 2011).<sup>2</sup>

In addition, twelve federal district courts in circuits yet to weigh in on the issue,<sup>3</sup> as well as three

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<sup>2</sup> *Hong* considered the question presented in a different procedural context than this case. There, the habeas petitioner, unlike the petitioner here, argued that *Padilla* is a new rule, attempting to trigger an exception to the habeas statute’s limitations period. But the same *Teague* analysis applies in both situations.

<sup>3</sup> See *United States v. Perez*, 2010 WL 4643033 (D. Neb. Nov. 9, 2010); *United States v. Bacchus*, 2010 WL 5571730 (D.R.I. Dec. 8, 2010); *Mendoza v. United States*, 774 F. Supp. 2d 791, 798 (E.D. Va. Mar. 24, 2011); *Dennis v. United States*, 787 F. Supp. 2d 425 (D.S.C. 2011); *Mathur v. United States*, 2011 WL 2036701 (E.D.N.C. May 24, 2011); *Ellis v. United States*, 2011 WL 3664658 (E.D.N.Y. June 6, 2011); *Llanes v. United States*, 2011 WL 2473233 (M.D. Fla. June 22, 2011); *United*

state intermediate appellate courts,<sup>4</sup> have held that *Padilla* is a new rule that does not apply on collateral review.

2. In reaching their decisions, both the Seventh and Tenth Circuits acknowledged that they were reaching “the opposite conclusion” from decisions from the Third Circuit and the Massachusetts Supreme Judicial Court. *Chang Hong*, \_\_\_ F.3d \_\_\_, 2011 WL 3805763, at \*7; *accord* Pet. App. 14a.

In particular, the Third Circuit has held that “because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an ‘old rule’ for *Teague* purposes and is retroactively applicable on collateral review.” *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011).

In a unanimous decision, the Massachusetts Supreme Judicial Court similarly held that *Padilla* is not a new rule under *Teague*, but rather is “the definitive application of” *Strickland* “to new facts.” *Commonwealth v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011).<sup>5</sup> The court accordingly concluded that

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*States v. Chapa*, 2011 WL 2730910 (N.D. Ga. July 12, 2011); *Zoa v. United States*, 2011 WL 3417116 (D. Md. Aug. 1, 2011); *Emojewwe v. United States*, 2011 WL 5118800 (M.D. Ala. Sept. 29, 2011); *Sarria v. United States*, 2011 WL 4949724 (S.D. Fla. Oct. 18, 2011); *Ufele v. United States*, 2011 WL 5830608 (D.D.C. Nov. 18, 2011).

<sup>4</sup> See *State v. Poblete*, 260 P.3d 1102 (Ariz. Ct. App. 2011); *State v. Barrios*, 2010 WL 5071177 (N.J. Super. Ct. App. Div. Dec. 14, 2010); *Gomez v. State*, 2011 WL 1797305 (Tenn. Crim. App. May 12, 2011).

<sup>5</sup> Although state courts are not bound to follow *Teague*, see *Danforth v. Minnesota*, 552 U.S. 264 (2008), Massachusetts, like



*Padilla* applies retroactively to “convictions obtained after the effective date of IIRIRA . . . the point at which deportation became ‘intimately related to the criminal process’ and ‘nearly an automatic result for a broad class of noncitizen offenders.’” *Id.* at 904 (quoting *Padilla*, 130 S. Ct. at 1481).<sup>6</sup>

Ten district courts in circuits yet to weigh in on the issue also have held that *Padilla* is an old rule that applies retroactively.<sup>7</sup> Five state appellate

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Kentucky, has adopted the *Teague* framework. See *Commonwealth v. Bray*, 553 N.E.2d 538, 540-41 (Mass. 1990); see also *Clarke*, 949 N.E.2d at 897 n.7. The Massachusetts Supreme Judicial Court’s conclusion that *Padilla* applies retroactively on collateral review rested on its application of *Teague*. *Id.* As such, the decision represents a holding on the federal question at issue here. See *St. Louis, Iron Mtn. & S. Ry. v. Taylor*, 210 U.S. 281, 293 (1908) (explaining that a decision rests on federal law when a state court chooses to apply a federal standard and bases its decision upon an interpretation of that standard).

<sup>6</sup> The Maryland Court of Appeals (the highest court in the state) also has held that *Padilla* applies retroactively to all convictions obtained after the effective date of IIRIRA. See *Denisyuk v. State*, \_\_\_ A.2d \_\_\_, 2011 WL 5042332, at \*8 (Md. Oct. 25, 2011). Unlike Massachusetts and Kentucky, however, Maryland does not follow the *Teague* doctrine. See *id.* at \*8 n.8. But the Maryland Court of Appeals noted that it agreed with its “sister courts in the Third Circuit, Massachusetts, Illinois, Minnesota, and Texas that . . . *Padilla* is an application of *Strickland* to a specific set of facts,” *id.* at \*9, and decided that *Padilla* therefore does not “declare a new principle of law,” *id.* (quotation marks and citation omitted).

<sup>7</sup> See *United States v. Hubenig*, 2010 WL 2650625 (E.D. Cal. July 1, 2010); *Al Kokabani v. United States*, 2010 WL 3941836 (E.D.N.C. July 30, 2010); *Luna v. United States*, 2010 WL 4868062 (S.D. Cal. Nov. 23, 2010); *United States v. Joong Ral Chong*, 2011 WL 6046905 (S.D. Ga. Jan. 12, 2011); *United*

courts likewise have held that *Padilla* is not a new rule.<sup>8</sup> Most of these other courts have reached this conclusion by applying straightforward *Teague* analyses to the reasoning in *Padilla*. But at least one, following a GVR from this Court for further consideration in light of *Padilla*, felt bound by the fact that “*Padilla* itself was on collateral review” to hold that it therefore *must* apply retroactively. *Santos-Sanchez v. United States*, 2011 WL 3793691, at \*10 (S.D. Tex. Aug. 24, 2011), *on remand from* 130 S. Ct. 2340 (2010) (No. 08-9888).

3. The division among federal and state courts is not only widely acknowledged; it is now entrenched. At least sixty-four judges in the federal and state judiciaries have ruled on whether *Padilla* is a new rule. Thirty-six have concluded that *Padilla* is merely an application of *Strickland*, and twenty-eight have held that it announced a new rule. Both sides of this debate have thoroughly ventilated their views, yet the conflict<sup>9</sup> only continues to deepen. Furthermore, courts of appeals on both sides of the conflict have denied petitions for rehearing en banc.

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*States v. Zhong Lin*, 2011 WL 197206 (W.D. Ky. Jan. 20, 2011); *Zapata-Banda v. United States*, 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); *Amer v. United States*, 2011 WL 2160553 (N.D. Miss. May 31, 2011); *Song v. United States*, 2011 WL 2533184 (C.D. Cal. June 27, 2011); *United States v. Dass*, 2011 WL 2746181 (D. Minn. July 14, 2011); *United States v. Reid*, 2011 WL 3417235 (S.D. Ohio Aug. 4, 2011).

<sup>8</sup> See *People v. Gutierrez*, 954 N.E.2d 365 (Ill. App. Ct. 2011); *Campos v. State*, 798 N.W.2d 565 (Minn. Ct. App. 2011); *People v. Nunez*, 917 N.Y.S.2d 806 (App. Term. 2010); *Ex parte Tanklevskaya*, 2011 WL 2132722 (Tex. App. May 26, 2011); *Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. App. 2011).

See Pet. App. 56a; *Orocio*, No. 10-1231 (3d Cir. Oct. 11, 2011); *Chang Hong*, No. 10-6294 (10th Cir. Oct. 11, 2011). It is time for this Court to step in.

## II. The Retroactive Effect Of *Padilla* Is An Exceptionally Important Issue That This Court Should Resolve Now.

As the Government has emphasized, the question whether *Padilla* has retroactive effect on collateral review is “a question of exceptional importance.” Gvt’s Pet. for Reh’g En Banc 3-4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011). This is so for at least two reasons.

1. As the citations in the previous section demonstrate, the question whether *Padilla* is retroactive is a frequently recurring issue. Indeed, given the recurring nature of retroactivity questions in general, and the fact that they often go to the core of the legitimacy of criminal convictions, this Court has regularly recognized an obligation to decide whether new criminal procedure decisions apply retroactively under the *Teague* doctrine. See, e.g., *Whorton v. Bockting*, 549 U.S. 406 (2007) (considering whether *Crawford v. Washington*, 541 U.S. 36 (2004), was retroactive); *Beard v. Banks*, 542 U.S. 406 (2004) (considering whether *Mills v. Maryland*, 486 U.S. 367 (1988), was retroactive); *Schriro v. Summerlin*, 542 U.S. 348 (2004) (considering whether *Ring v. Arizona*, 536 U.S. 584 (2002), was retroactive). The same should be true here.

Judges in the federal and state judiciaries have spent – and continue to spend – considerable time and resources on the question of *Padilla*’s retroactivity. Meanwhile, petitioners face lingering

uncertainty about their immigration status while appeals are pending in courts across the country. Waiting for a later case to resolve the issue would needlessly increase the expenditure of judicial resources on a question the lower courts have already thoroughly considered. It also would risk harming people in the Seventh Circuit and elsewhere who – in the event this Court confirms that *Padilla* is retroactive – may lose the ability to marshal evidence necessary to prove their cases, as memories fade, witnesses become impossible to locate, and so on. Worse yet, such people may be unjustly deported.

2. Whether *Padilla* is retroactive is a question of profound practical significance. Deportation is a “particularly severe penalty.” *Padilla*, 130 S. Ct. at 1481 (quotation marks omitted). If Chaidez, for example, were deported, she would not only be uprooted from the country she has called home for over thirty years, but also separated from her three children and two grandchildren. See Pet. App. 31a. On the other hand, if individuals who pleaded guilty to aggravated felonies due to ineffective assistance of counsel are entitled to have their convictions vacated under *Padilla*, they may insist on trials, which could result in their acquittal or conviction on lesser, non-deportable offenses. Alternatively, individuals facing deportation if convicted of certain charges might also be able to negotiate with the Government to plead to comparable offenses that would not trigger removal (or that would at least enable them to apply for relief from removal). See *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

The ability to pursue such courses of action to avoid removal should not turn on the mere

happenstance of geography. Indeed, given the intransigence of the circuit conflict and the stakes involved for individuals such as Chaidez, it would be unfair to deny certiorari now, only to grant certiorari on this unavoidable question later.

### III. This Case Is An Optimal Vehicle For The Court To Resolve This Issue.

This case is an optimal vehicle for clarifying whether this Court's holding in *Padilla* applies retroactively to persons whose convictions became final before its announcement. The district court wrote a thorough and "thoughtful opinion," Pet. App. 3a, and a divided court of appeals considered and decided only this single question, *id.* 6a.

Furthermore, the question whether *Padilla* applies retroactively is outcome-determinative here. After an evidentiary hearing, the district court found that Chaidez's counsel rendered deficient performance under *Padilla* and that Chaidez's defense was prejudiced as a result. Specifically, the district court observed that although "the standard practice in 2003 was for attorneys to inform their clients of immigration consequences of guilty pleas," Pet. App. 35a, "the un rebutted, credible evidence [was] that [petitioner's counsel] failed to do so in this case," *id.* 36a. And the court found that "had Chaidez known of the immigration consequences, she would not have pled guilty." *Id.*; see also *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice exists under *Strickland* when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial"). The Government's appeal to the Seventh Circuit did not challenge these findings.



Rather, it challenged only the district court's judgment that *Padilla* did not announce a new rule under *Teague*.

#### IV. The Seventh Circuit's Decision Is Incorrect.

1. A decision applies retroactively when it is "merely an application of the principle that governed" a prior Supreme Court decision. *Teague v. Lane*, 489 U.S. 288, 307 (1989). Moreover, as Justice Kennedy has explained, "[w]here the beginning point" for a new decision is a prior, more general holding "designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment).

*Strickland v. Washington*, 466 U.S. 668 (1984), which was the beginning point for *Padilla*, is such a general holding designed for fact-specific application. *Strickland* holds that the Sixth Amendment right to counsel requires reasonable attorney performance. The *Strickland* Court declined to list a particular set of obligations for counsel to meet this standard of reasonableness. *Id.* at 688-89. Rather, this Court explained that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Accordingly, "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

While this Court has never directly confronted the question whether one of its *Strickland* decisions

should be given retroactive effect under *Teague*, this Court's jurisprudence under 28 U.S.C. § 2254(d) of the Antiterrorism and Effective Death Penalty Act strongly suggests that applying *Strickland* to a new set of facts does not create a new rule. Section 2254(d) bars granting habeas relief unless a state court "unreasonabl[y]" applied clearly established law. 28 U.S.C. § 2254(d)(1). While this rule is "distinct" from *Teague's* bar against granting relief unless dictated by prior precedent, *Greene v. Fisher*, 132 S. Ct. 38, \_\_ (2011), this Court has explained that applying *Strickland* to attorneys' failures to perform tasks other than those at issue in *Strickland* itself "can hardly be said" to "break[] new ground or impose[] a new obligation on the States," *Williams*, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301). Consequently, this Court has not hesitated to grant habeas relief in several contexts beyond the facts of *Strickland*. Compare *Strickland*, 466 U.S. at 699 (failure to present character and psychological evidence at sentencing stage of capital case), with *Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to investigate nature of client's prior conviction), *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure to conduct sufficient investigation concerning client's background), and *Williams*, 529 U.S. 362 (same).

Furthermore, federal appellate courts that have directly addressed the question whether this Court's applications of *Strickland* in *Rompilla*, *Wiggins*, and *Williams* constitute "new rules" under *Teague* have

consistently concluded that they do not.<sup>9</sup> And every federal appellate court to squarely confront the question of retroactivity in the context of this Court's holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) – that counsel is ineffective for failing to inform defendants of their appeal rights – has held that the rule is not new for purposes of retroactivity because it flowed from *Strickland*.<sup>10</sup>

2. This Court's decision in *Padilla* was simply another fact-specific application of *Strickland's* general legal principle that counsel must provide reasonably effective assistance. In *Padilla*, this Court analyzed the lawyer's failure to tell his client that pleading guilty would subject him to deportation, relying on the "practice and expectations of the legal community." 130 S. Ct. at 1482.

Specifically, in 1996, Congress passed IIRIRA, dramatically expanding the number of offenses that trigger automatic removal and effectively eliminating the Attorney General's discretion to grant relief from deportation. The effect was to make the "drastic measure" of deportation – something often more important to noncitizens than the extent of potential criminal punishment itself – "virtually inevitable for a vast number of noncitizens convicted of crimes."

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<sup>9</sup> See *Newland v. Hall*, 527 F.3d 1162, 1197 (11th Cir. 2008) (*Williams*, *Wiggins*, and *Rompilla* were "not new law under *Teague*"); *Smith v. Dretke*, 422 F.3d 269, 278 n.2 (5th Cir. 2005) (*Wiggins* was not a new rule).

<sup>10</sup> See *Tanner v. McDaniel*, 493 F.3d 1135, 1142 (9th Cir. 2007); *Frazer v. South Carolina*, 430 F.3d 696, 704-05 (4th Cir. 2005); *Lewis v. Johnson*, 359 F.3d 646 (3d Cir. 2004).



*Padilla*, 130 S. Ct. at 1478. Thus, especially in the wake of the new Act, professional norms crystallized requiring counsel to inform defendants about possible deportation consequences of pleading guilty to certain crimes. *Id.* at 1481-82 (citing various sources). As this Court later noted, there could be “little doubt that, as a general matter,” at least by the mid-1990s, alien defendants were generally “acutely aware of the immigration consequences of their convictions.” *INS v. St. Cyr*, 533 U.S. 289, 322 (2001); *see also id.* (“Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” (quoting 3 *Bender’s Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999))).

Yet *Padilla*’s counsel did not advise him about such consequences, much less try to negotiate a plea “in order to craft a conviction and sentence that reduce[d] the likelihood of deportation.” *Padilla*, 130 S. Ct. at 1486. Thus, the *Strickland* doctrine dictated that at the time of *Padilla*’s conviction in 2003, his counsel was constitutionally deficient in neglecting to advise him about the deportation consequences of his plea.

3. The Seventh Circuit did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did it dispute that “the application of *Strickland* to unique facts generally will not produce a new rule.” Pet. App. 15a. The Seventh Circuit majority nevertheless held that *Padilla* is a new rule because its “outcome was susceptible to reasonable debate,” *id.* 7a-8a, as evidenced by two things: (a) the “array of views” this Court’s justices expressed in deciding the

case; and (b) the existence of three post-IIRIRA federal appellate decisions refusing to apply *Strickland* to the failure to give advice concerning deportation consequences of criminal convictions. *Id.* 7a-8a, 11a.

This reasoning does not withstand close scrutiny. As an initial matter, the Seventh Circuit overstated the extent of the judicial disagreement over applying *Strickland* to the failure to give advice concerning deportation consequences. It is true that the dissent in *Padilla* argued that *Strickland* should not apply to advice concerning deportation or any other purportedly “collateral” consequence of a conviction. *Padilla*, 130 S. Ct. at 1495-96 (Scalia, J., dissenting). But Justice Alito’s concurring opinion *accepted* that *Strickland* required attorneys to “advise the defendant that a criminal conviction may have adverse immigration consequences.” *Id.* at 1487. He took issue – and characterized as a “dramatic departure from precedent” – only the majority’s additional suggestion that *Strickland* requires something more specific than such a general warning. *Id.* at 1487-88. This requirement is not at issue where, as here, the defendant received no warning of any kind with respect to deportation consequences of pleading guilty.

Furthermore, two of the three lower court decisions that, according to the Seventh Circuit, refused before *Padilla* to hold that a failure to advise of deportation consequences violated *Strickland* are distinguishable from the situation here. One emphasized that – unlike in *Padilla* and this case – the defendant’s attorney *had* indeed “indicated that deportation was possible.” *Santos-Sanchez v. United*

*States*, 548 F.3d 327, 333 (5th Cir. 2008). Another predated this Court's emphasis in 2001 in that at least after IIRIRA, noncitizen defendants were generally "acutely aware" of deportation consequences of pleas." *St. Cyr*, 533 U.S. at 322-23. See *United States v. Gonzalez*, 202 F.3d 20, 26 (1st Cir. 2000) (reasoning that IIRIRA did not "substantially alter" the need to give deportation advice).

At any rate, "the mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. at 410 (quoting *Wright v. West*, 505 U.S. at 304); *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004) (noting that the Court has not "suggest[ed] that the mere existence of a dissent suffices to show that the rule is new"); see *Teague*, 489 U.S. at 307 (explaining that *Francis v. Franklin*, 471 U.S. 307 (1985), did not establish a new rule, even though the dissent in that case argued that it "needlessly extend[ed]" the holding of a prior case, *id.* at 332 (Rehnquist, J., dissenting)). Instead, the test for determining whether a holding was dictated by precedent is an "objective" one. *Williams*, 529 U.S. at 410 (citation omitted). If, in light of prior precedent from this Court, a holding did not "break[] new ground or impose[] a new obligation on the States or the Federal Government," it is not a new rule. *Teague*, 489 U.S. at 301.

In *Padilla* this Court did not break any new ground; it simply held its ground. The *Padilla* Court reaffirmed that *Strickland's* performance prong is keyed to "prevailing professional norms." 130 S. Ct. at 1482. And at least since IIRIRA's dramatic changes to immigration law went into effect, there

has been no dispute that professional norms require advice on deportation consequences. *See id.*

To be sure, the *Padilla* dissent, like some prior lower court decisions, sought to impose a new limitation on *Strickland's* professional norms doctrine, limiting it to advice concerning direct consequences of pleas. *See* 130 S. Ct. at 1495 (Scalia, J., dissenting). But this Court rejected that argument, using language emphasizing that it was the dissent – not the majority – that was seeking to make new law. This Court explained that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*,” *id.* at 1481 (citation omitted), and it saw no good reason to do so in the context of the failure to warn of deportation consequences.

Indeed, this pattern has played out before, with this Court holding that a new application of *Strickland* did not create a new rule. In *Wiggins*, this Court considered whether *Williams* broke new ground in holding that the failure to investigate the defendant’s background in preparation for a capital sentencing hearing amounted to ineffective assistance of counsel. 539 U.S. at 522. *Strickland* itself did not involve a background investigation, so one could have argued that “[t]here was nothing in *Strickland* . . . to support *Williams’* statement that trial counsel had an obligation to conduct” such an investigation. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting) (quotation marks omitted). The *Wiggins* Court rejected such a parsing of *Strickland*, explaining that the Court “made no new law in

resolving Williams' ineffectiveness claim." *Id.* at 522 (majority opinion). Rather, the *Williams* Court merely applied *Strickland* in a new setting, holding that counsel's failure to satisfy the requirement in the ABA Standards for Criminal Justice that capital defense counsel conduct background investigations constituted deficient performance. *See id.*

Like the holding in *Williams*, the holding in *Padilla* was dictated by precedent: it was well established long before *Padilla* that the Sixth Amendment's guarantee of effective assistance of counsel turns on the adherence to prevailing professional norms, and it was equally well established by 2003 that those norms required attorneys to advise clients concerning deportation consequences of pleas. Accordingly, the holding in *Padilla* should apply – as in *Padilla* itself – to cases involving convictions that became final before its announcement.

# CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Charles Roth  
Claudia Valenzuela  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle Street  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave., N.W.  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

December 2011



## **APPENDIX**



**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT**

Roselva CHAIDEZ,  
Petitioner-Appellee,  
v.

UNITED STATES of America,  
Respondent-Appellant.

No. 10-3623.  
Argued June 10, 2011.  
Decided Aug. 23, 2011.

**OPINION**

**Before BAUER, FLAUM, AND WILLIAMS, *Circuit Judges*.**

FLAUM, Circuit Judge.

In *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486, (2010), the Supreme Court held that an attorney provides ineffective assistance of counsel by failing to inform a client that a guilty plea carries a risk of deportation. The district court concluded that *Padilla* did not announce a new rule under the framework set forth in *Teague v. Lane*, 489 U.S. 288 (1989), and consequently applied its holding to Petitioner Roselva Chaidez's collateral appeal. Because we conclude that *Padilla* announced a new rule that does not fall within either of *Teague's* exceptions, we reverse the judgment of the district court.<sup>1</sup>

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<sup>1</sup> This opinion and the dissent have been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). A majority of the judges did not favor rehearing en

## I. Background

Chaidez entered the United States from her native Mexico in 1971, and became a lawful permanent resident in 1977. In June 2003, Chaidez was indicted on three counts of mail fraud in connection with a staged accident insurance scheme in which the loss to the victims exceeded \$10,000. On the advice of counsel, Chaidez pled guilty to two counts on December 3, 2003. She was sentenced to four years' probation on April 1, 2004, and judgment was entered in her case on April 8, 2004. Chaidez did not appeal.

Federal law provides that an alien who is "convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Chaidez's plea of guilty to a fraud involving a loss in excess of \$10,000 rendered her eligible for removal from the United States as an aggravated felon. *See* 8 U.S.C. § 1101(a)(43)(M)(i). The government initiated removal proceedings in 2009, after Chaidez unsuccessfully filed an application for U.S. citizenship.

In an effort to avoid removal, Chaidez sought to have her conviction overturned. To that end, she filed a motion for a writ of coram nobis in her criminal case on January 25, 2010. She alleges ineffective assistance of counsel in connection with her decision to plead guilty, claiming that her defense attorney failed to inform her that a guilty plea could lead to removal. Chaidez maintains that she would not have pled guilty if she had been made aware of the immigration consequences of such a plea.

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banc. Circuit Judges Rovner, Wood, Williams, and Hamilton voted to rehear the case en banc.

On March 31, 2010, while Chaidez's motion was pending before the district court, the Supreme Court issued its decision in *Padilla*. In a thoughtful opinion, Judge Gottschall acknowledged that this case presents a close call. She concluded that *Padilla* did not announce a new rule for *Teague* purposes, but rather was an application of the Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). Having concluded that *Padilla* applied to Chaidez's case, the district court considered the merits of her coram nobis petition. The court granted the petition and vacated Chaidez's conviction. The government appeals the district court's underlying ruling regarding the retroactive effect of *Padilla*.

## II. Discussion

The writ of coram nobis, available under the All Writs Act, 28 U.S.C. § 1651(a), provides a method for collaterally attacking a criminal conviction when a defendant is not in custody, and thus cannot proceed under 28 U.S.C. § 2255. *United States v. Folak*, 865 F.2d 110, 112–13 (7th Cir. 1988). The writ is an extraordinary remedy, allowed only where collateral relief is necessary to address an ongoing civil disability resulting from a conviction. *Godoski v. United States*, 304 F.3d 761, 762 (7th Cir. 2002). Because a writ of error coram nobis affords the same general relief as a writ of habeas corpus, *Howard v. United States*, 962 F.2d 651, 653 (7th Cir. 1992), we proceed as we would in a habeas case. *See United States v. Mandanici*, 205 F.3d 519, 527 (2d Cir. 2000) (applying *Teague* in a case involving a coram nobis petition); *United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997) (same). Our review is de novo.

In *Padilla*, the Court considered the petitioner's claim that his counsel provided ineffective assistance by erroneously advising him that pleading guilty to a drug distribution charge would not impact his immigration status. The Kentucky Supreme Court had rejected Padilla's claim, concluding that advice regarding the collateral consequences of a guilty plea ("i.e., those matters not within the sentencing authority of the state trial court"), including deportation, is "outside the scope of representation required by the Sixth Amendment." 130 S. Ct. at 1481. As the *Padilla* Court noted, many state and federal courts had similarly concluded that a defendant's Sixth Amendment right to effective assistance of counsel was limited to advice about the direct consequences of a guilty plea (i.e., length of imprisonment), and did not extend to information regarding collateral consequences (i.e., deportation). *Id.* However, in a majority opinion authored by Justice Stevens, the *Padilla* Court concluded that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." 130 S. Ct. at 1482. Noting that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*," the Court declined to consider the appropriateness of the direct/collateral distinction generally. *Id.* at 1481. Rather, it found such a distinction "ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id.* at 1481–82.

The majority based that conclusion on "the unique nature of deportation"—specifically, its severity as a

penalty and its close relationship to the criminal process. *Id.* at 1481. The Court noted that recent changes in federal immigration law, including the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), had served to further “enmesh[ ] criminal convictions and the penalty of deportation,” by making “removal nearly an automatic result for a broad class of noncitizen offenders.” *Id.* at 1478–81. Those changes convinced the Court that “deportation is an integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes,” and cannot be “divorce[d] . . . from the conviction.” *Id.* at 1480–81. As a result, the Court concluded that *Strickland* applied to Padilla’s ineffective assistance claim. 130 S. Ct. at 1482.

The Court went on to consider the first *Strickland* prong—whether Padilla had established that his counsel’s representation fell below an objective standard of reasonableness. In order to determine what constituted reasonable representation under the circumstances, the Court looked to prevailing professional norms set forth by the American Bar Association and numerous other authorities. *Id.* at 1482, 1485. The Court found that, dating back to the mid-1990s, those authorities had been in agreement that counsel must advise his or her client regarding the risk of deportation. *Id.* Thus, the Court held that defense counsel provides constitutionally deficient representation by failing to inform a defendant that a guilty plea carries a risk of deportation. *Id.* at 1486.

Chaidez seeks to have *Padilla* applied to her case on collateral review, despite the fact that the criminal case against her was final on direct review when



*Padilla* was decided. *Teague* governs our analysis. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Under *Teague*, a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts. *Id.* A new rule applies only to cases that still are on direct review, unless one of two exceptions applies. *Id.* In particular, a new rule applies retroactively on collateral review if (1) it is substantive or (2) it is a “watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Id.* (citations omitted).

The parties agree that if *Padilla* announced a new rule neither exception to non-retroactivity applies. Therefore, whether *Padilla* announced a new constitutional rule of criminal procedure is the sole issue before us. The district courts that have addressed that issue—including those in this circuit—are split. *See United States v. Diaz–Palmerin*, 2011 WL 1337326 (N.D. Ill. April 5, 2011) (*Padilla* did not announce a new rule); *Martin v. United States*, 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010) (same); *United States v. Chavarria*, 2011 WL 1336565 (N.D. Ind. April 7, 2011) (same); *United States v. Laguna*, 2011 WL 1357538 (N.D. Ill. April 11, 2011) (*Padilla* announced a new rule); *United States v. Aceves*, 2011 WL 976706, at \*3 (D. Hawai’i March 17, 2011) (collecting cases). The Third Circuit recently became the first of our sister circuits to weigh in, holding that *Padilla* simply applied the old *Strickland* rule, such that it is retroactively applicable on collateral review. *United States v. Orocio*, 645 F.3d 630, 640–42 (3d Cir. 2011).

A rule is said to be new when it was not “dictated by precedent existing at the time the defendant’s



conviction became final.” *Teague*, 489 U.S. at 301 (emphasis in original). That definition of what constitutes a new rule reflects the fact that *Teague* was developed in the context of federal habeas, which is designed “to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.” *Sawyer v. Smith*, 497 U.S. 227, 235 (1990). See also *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (describing *Teague* as a “limit[ation on] the authority of federal courts to overturn state convictions”). Thus, the Court has explained that *Teague* “validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.” *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)). The pertinent inquiry here is whether *Padilla*’s outcome was “susceptible to debate among reasonable minds.” *Butler*, 494 U.S. at 415. Put differently, “our task is to determine whether a . . . court considering [Chaidez’s] claim at the time [her] conviction became final”—pre-*Padilla*—“would have felt compelled by existing precedent to conclude that [*Padilla*] was required by the Constitution.” *Saffle*, 494 U.S. at 488.

That task is a “difficult” one where, as here, the decision at issue “extends the reasoning of . . . prior cases,” as opposed to “explicit[ly] overruling . . . an earlier holding.” *Id.* However, the Court’s retroactivity jurisprudence provides guidance. In assessing whether the outcome of a case was susceptible to reasonable debate, the Court has looked to both the views

expressed in the opinion itself and lower court decisions. Lack of unanimity on the Court in deciding a particular case supports the conclusion that the case announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414–15 (2004) (concluding that a rule was new where, in the case announcing the rule, four Justices dissented, expressing the view that the Court’s outcome was not controlled by precedent); *Sawyer v. Smith*, 497 U.S. 227, 236–37 (1990) (concluding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced a new rule, in part based on the views of the *Caldwell* dissenters). Similarly, if the lower courts were split on the issue, the Court has concluded that the outcome of the case was susceptible to reasonable debate. *See Butler*, 494 U.S. at 415 (“That the outcome in [*Arizona v.*] *Roberson*[, 486 U.S. 675 (1988)] was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits”); *O’Dell v. Netherland*, 521 U.S. 151, 166 n.3 (1997) (finding support for its conclusion that a case announced a new rule “in the decisions of the state courts and the lower federal courts,” none of which previously had adopted the rule). These considerations convince us that *Padilla* announced a new rule.

The majority opinion in *Padilla* drew a concurrence authored by Justice Alito and joined by Chief Justice Roberts, as well as a dissenting opinion authored by Justice Scalia and joined by Justice Thomas. That the members of the *Padilla* Court expressed such an “array of views” indicates that *Padilla* was not dictated by precedent. *O’Dell*, 521 U.S. at 159. Moreover, the views expressed in each of the

opinions support that conclusion. Statements in the concurrence leave no doubt that Justice Alito and Chief Justice Roberts considered *Padilla* to be groundbreaking. See 130 S. Ct. at 1488, 1491, 1492 (referring to the majority's holding as a "dramatic departure from precedent," "a major upheaval in Sixth Amendment law," and a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment"). And the two dissenting Justices, who expressed the view that the majority's extension of the Court's Sixth Amendment jurisprudence lacked "basis in text or in principle," certainly did not see *Padilla* as dictated by precedent. 130 S. Ct. at 1495 (Scalia, J., dissenting). See also *Sawyer*, 497 U.S. at 236–37. Even the majority suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*'s claim "follow[ed] from" its decision applying *Strickland* to advice regarding guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985), *Hill* "does not control the question before us." *Id.* at 1485 n.12. It seems evident from Supreme Court precedent that *Padilla* cannot be an old rule simply because existing case law "inform[ed], or even control[led] or govern[ed]," the analysis. *Saffle*, 494 U.S. at 488. Nor will the rule of *Padilla* be deemed old because precedent lent "general support" to the rule it established, *Sawyer*, 497 U.S. at 236, or because it represents "the most reasonable . . . interpretation of general law," *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). *Padilla* can only be considered an old rule if Supreme Court precedent "*compel[led]*" the result. *Saffle*, 494 U.S. at 490. The majority's characterization of *Hill* suggests that it did not understand the rule set forth in *Padilla* to be dictated by precedent.

Our conclusion that *Padilla* announced a new rule finds additional support in pre-*Padilla* decisions by state and federal courts. Prior to *Padilla*, the lower federal courts, including at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea. *See Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in judgment) (“Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction,” not collateral consequences such as deportation); Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699, 703 (2002) (stating that “virtually all jurisdictions” to have considered the issue had held that “defense lawyers must explain the direct consequences of a plea, such as length of imprisonment and amount of fine, but need not explain ‘collateral consequences,’ such as . . . deportation”); *Commonwealth v. Clarke*, 460 Mass. 30, 35–36 (Mass. 2011) (“*Padilla* effectively changed the law in the nine circuit courts of the United States Court of Appeals that had previously addressed the issue” of whether “defense counsel was ineffective by failing to advise her client of the virtually automatic deportation consequences of his guilty plea”). Courts in at least thirty states and the District of Columbia had reached the same conclusion. 87 CORNELL L. REV. at 699. Such rare unanimity among the lower courts is compelling evidence that reasonable jurists reading the Supreme Court’s precedents in April 2004 could have disagreed about the outcome of *Padilla*. *See Lambrix*, 520 U.S. at 538



(finding it “plain . . . that a jurist considering all the relevant material . . . could reasonably have reached a conclusion contrary to our holding in” *Espinosa v. Florida*, 505 U.S. 1079 (1992) (*per curiam*), where “both before and after [petitioner’s] conviction became final, every court decision we are aware of did so”).

In concluding that *Padilla* did not announce a new rule, the Third Circuit downplayed the significance of the contrary lower court decisions, reasoning that they generally pre-dated the adoption of the professional norms relied on by the *Padilla* Court. *Orocio*, 645 F.3d at 639–40. Not so. While Justice Alito cited primarily pre-1995 cases in his concurrence, in the years preceding *Padilla*, the lower federal courts consistently reaffirmed that deportation is a collateral consequence of a criminal conviction and that the Sixth Amendment does not require advice regarding collateral consequences. *See United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003); *Jimenez v. United States*, 154 Fed. Appx. 540, 541 (7th Cir. 2005) (unpublished). In doing so, three Courts of Appeals explicitly rejected the argument that the enactment of the IIRIRA altered the calculus. *See United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir. 2000) (holding that deportation remained a collateral consequence of conviction after the passage of the IIRIRA, and reaffirming its prior conclusion that an attorney’s failure to advise a client of his plea’s immigration consequences does not give rise to a cognizable ineffective assistance claim); *Santos-Sanchez v. United States*, 548 F.3d 327, 336–37 (5th Cir. 2008) (concluding that “neither IIRIRA nor AEDPA has so altered the nature of deportation as to render it a direct consequence of a guilty plea,” and reaffirming

that “counsel’s failure to inform a defendant of the collateral consequences of a guilty plea is never deficient performance under *Strickland*”); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004) (concluding that even under the IIRIRA and AEDPA, “deportation remains a collateral consequence of a criminal conviction, and counsel’s failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation”).

We acknowledge that “the mere existence of conflicting authority does not necessarily mean a rule is new.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000), quoting *Wright v. West*, 505 U.S. 277, 304 (1992) (O’Connor, J., concurring). But, in our view, “an objective reading of the relevant cases” demonstrates that *Padilla* was not dictated by precedent. *Stringer v. Black*, 503 U.S. 222, 237 (1992). It is true that, unlike so many lower courts, the Supreme Court has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.” *Padilla*, 130 S. Ct. at 1481. As such, prior to *Padilla*, the Court had not foreclosed the possibility that advice regarding collateral consequences of a guilty plea could be constitutionally required. But neither had the Court required defense counsel to provide advice regarding consequences collateral to the criminal prosecution at issue.<sup>2</sup> 130 S. Ct. at 1495 (Scalia, J., dissenting).

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<sup>2</sup> In *Hill*, the Court considered whether a criminal defendant’s Sixth Amendment right to counsel was violated when his counsel misinformed him about his eligibility for parole, a collateral consequence of conviction. However, the Court found it “unnecessary to determine whether there may be circumstances



Moreover, the distinction between direct and collateral consequences was not without foundation in Supreme Court precedent. It can be traced to the Court's jurisprudence regarding the validity of guilty pleas. To be valid, a guilty plea must be both voluntary and intelligent. *Brady v. United States*, 397 U.S. 742, 747 (1970). The Court has long held that a plea is voluntary where the defendant is "fully aware of the direct consequences" of the plea. *Id.* The Court also has said that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (citation omitted). At least some lower courts extrapolated from these holdings that counsel performs effectively by advising a client as to the direct consequences of conviction. See 87 CORNELL L. REV. at 726 (attributing the collateral consequences rule to "the *Brady* Court's implication that a trial court need advise a defendant only of direct consequences to render a plea voluntary under the Due Process Clause"); *Santos v. Kolb*, 880 F.2d 941, 944 (7th Cir. 1989) (concluding, based on *Hill*, that "the key to whether defense counsel has failed to provide effective assistance is whether his shortcomings resulted in an involuntary or unintelligent plea"); *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993) (concluding that counsel's failure to warn of possible deportation did not amount to ineffective assistance of counsel, reasoning that that

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under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S. at 60.

“conclusion squares with the Supreme Court’s observation that the accused must be ‘fully aware of the *direct* consequences’ of a guilty plea”) (quoting *Brady*, 397 U.S. at 755).

Therefore, we “cannot say that the large majority of federal and state courts that ha[d] rejected” ineffective-assistance-of-counsel claims based on advice about the deportation consequences of a plea were “unreasonable” in their reading of existing Supreme Court precedent. *Saffle*, 494 U.S. at 490. We consequently remain persuaded by the weight of lower court authority that, in 2004, a jurist could reasonably have reached a conclusion contrary to the holding in *Padilla*, such that *Padilla* announced a new rule for purposes of *Teague*.

As the Massachusetts Supreme Judicial Court recently noted, “[t]here is no question that the holding in *Padilla* is an extension of the rule in *Strickland*,” “[n]or is there any question that the Supreme Court was applying the first prong of the *Strickland* standard when it concluded that the failure of counsel to provide her client with available advice about an issue like deportation was constitutionally deficient.” *Clarke*, 460 Mass. at 37. However, we disagree with that court’s conclusion that, because “the opinion in *Padilla* relies primarily on citation to *Strickland* itself,” *Padilla* was dictated by *Strickland*. *Id.* at 44. Under *Teague*, a rule is old only if it sets forth the *sole* reasonable interpretation of existing precedent. *Lambrix*, 520 U.S. at 538. The fact that *Padilla* is an extension of *Strickland* says nothing about whether it was new or not. *See Saffle*, 494 U.S. at 488 (“it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of

our prior cases”); *Butler*, 494 U.S. at 415 (“the fact that a court says that its decision is within the ‘logical compass’ of an earlier decision, or indeed that it is ‘controlled’ by a prior decision, is not conclusive for purposes of deciding whether the current decision is a ‘new rule’ under *Teague*”); *Frazer v. South Carolina*, 430 F.3d 696, 720 (4th Cir. 2005) (Luttig, J., dissenting) (“to establish that the Supreme Court relied exclusively on the principles of prior cases in reaching the rule of [*Roe v.*] *Flores–Ortega* [, 528 U.S. 470 (2000)] is not at all to establish that those cases dictated that rule, that is, that all reasonable jurists would have agreed that those precedents led inexorably to *Flores–Ortega*”).

We recognize that the application of *Strickland* to unique facts generally will not produce a new rule. See *Williams*, 529 U.S. at 382 (plurality) (“If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule”) (quoting *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring)). However, that guiding principle is not absolute. *Id.* (stating that “[w]here the beginning point is a rule of . . . general application, . . . it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent”).<sup>3</sup> We believe *Padilla* to be the rare

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<sup>3</sup> The *Williams* Court further stated that: “It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis.” 529 U.S. at 391. Some courts, and the dissent, appear to have read the first phrase in that sentence to mean that, in effect, no case applying the *Strickland* test

exception. Before *Padilla*, the Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client's criminal prosecution. In *Padilla*, the Court held that constitutionally effective assistance of counsel requires advice about a civil penalty imposed by the Executive Branch (now the Department of Homeland Security, formerly the Immigration and Naturalization Service) after the criminal case is closed. In our view, that result was sufficiently novel to qualify as a new rule. Indeed, if *Padilla* is considered an old rule, it is hard to imagine an application of *Strickland* that would qualify as a new rule. Perhaps in the future the Court will conclude, given the breadth and fact-intensive nature of the *Strickland* reasonableness standard, that cases extending *Strickland* are never new. But until that time, we are bound to apply *Teague* in the context of *Strickland*.

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announces a new rule. See *Clarke*, 460 Mass. at 39; *Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir. 2004). We believe the context in which the Court made that assertion undermines that interpretation. In *Williams*, the Court held that the "Virginia Supreme Court erred in holding that . . . *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified or in some way supplanted the rule set down in *Strickland*." 529 U.S. at 391. The Court simply was explaining that *Strickland* remains the test for analyzing ineffective-assistance-of-counsel claims, "virtually all" of which can be resolved without inquiring into "fundamental fairness," as the Court had in *Lockhart*. *Id.* at 391–93. See also *Frazer*, 430 F.3d at 723 (Luttig, J., dissenting) for a similar analysis. Moreover, the fact that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," does not mean it *dictates* the resolution of all such claims. *Id.*



The specific contours of the *Padilla* holding further indicate that it is a new rule. Under the rule set forth in *Padilla*, the scope of an attorney's duty to provide immigration-related advice varies depending on the degree of specialization required to provide such advice accurately. In particular, the Court held that "when the deportation consequence [of a guilty plea] is truly clear," counsel has a duty to "give correct advice." 130 S. Ct. at 1483. But "[w]hen the law is not succinct and straightforward," such that "the deportation consequences of a particular plea are unclear or uncertain," "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* That nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent.

The district court relied on the fact that *Padilla* itself was before the Court on a motion for post-conviction relief for its conclusion that the Court intended for *Padilla* to apply retroactively to cases on collateral appeal. In light of the fact that Kentucky did not raise *Teague* as a defense in *Padilla*, we do not assign the significance to *Padilla*'s procedural posture that the district court did. While "[r]etroactivity is properly treated as a threshold question," *Teague* "is not 'jurisdictional' in the sense that [the] Court . . . *must* raise and decide the issue *sua sponte*." *Collins v. Youngblood*, 497 U.S. 37, 40–41 (1990) (emphasis in original). Therefore, if a State does not rely on *Teague*, the Court has no obligation to address it, and can consider the merits of the claim. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). We believe it is more likely that the Court considered *Teague* to be waived,

than that it silently engaged in a retroactivity analysis.

Finally, the district court reasoned that the best way to make sense of the *Padilla* Court's discussion (and dismissal) of concerns that its ruling would undermine the finality of plea-based convictions was to conclude that the majority intended *Padilla* to apply retroactively. 130 S. Ct. at 1484–85. The Third Circuit reached a similar conclusion. *See also Orocio*, 645 F.3d at 640–42. That is a reasonable reading, and certainly is the most compelling argument that *Padilla* is an old rule. However, we are hesitant to depart from our application of the test set forth in *Teague* and its progeny—which points clearly in the direction of new rule—based on inferences from indirect language. Moreover, to the extent that we attempt to discern whether members of the Court understood *Padilla* to be a new rule, we find the clearest indications in the concurrence and dissent, which leave no doubt that at least four Justices view *Padilla* as new.

### III. Conclusion

The Supreme Court has defined the concept of an old rule under *Teague* narrowly, limiting it to those holdings so compelled by precedent that any contrary conclusion must be deemed unreasonable. While determining whether a rule is new can be challenging, and this case provides no exception, we conclude that the narrow definition of what constitutes an old rule tips the scales in favor of finding that *Padilla* announced a new rule. Moreover, that numerous courts had failed to anticipate the holding in *Padilla*, though not dispositive, is strong evidence that reasonable jurists could have debated the outcome. For the foregoing reasons, we REVERSE the judgment of



the district court and REMAND the case for further proceedings.

WILLIAMS, *Circuit Judge*, dissenting.

At the time Roselva Chaidez, a lawful permanent resident since 1977, entered her plea, prevailing professional norms placed a duty on counsel to advise clients of the removal consequences of a decision to enter a plea of guilty. I would join the Third Circuit in finding that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), simply clarified that a violation of these norms amounts to deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). See *United States v. Orocio*, \_\_\_ F.3d \_\_\_, 2011 WL 2557232 (3d Cir. June 29, 2011). As such, Padilla did not announce a “new rule” under *Teague v. Lane*, 489 U.S. 288 (1989), and is therefore retroactively applicable to Chaidez’s coram nobis petition seeking to vacate her guilty plea on the grounds that her counsel was ineffective. For the reasons set forth below, I dissent.

I do not disagree that *Teague* holds that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government,” and “if the result was not *dictated* by precedent existing at the time the [petitioner’s] conviction became final.” *Teague*, 489 U.S. at 301 (emphasis in original). I do, however, disagree with the majority as to how *Teague*’s holding applies in the context of *Strickland v. Washington*.

In *Padilla*, the Court found that because “deportation is a particularly severe ‘penalty,’ . . . advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right

to counsel.” 130 S. Ct. at 1478. The Court then stated that the first inquiry under *Strickland*, whether counsel’s representation “fell below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 688, is “necessarily linked to the practice and expectations of the legal community.” *Padilla*, 130 S. Ct. at 1482. Noting that *Strickland*’s standard looked to “reasonableness under prevailing professional norms,” the *Padilla* Court held that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* (citing *Strickland*, 466 U.S. at 688, and listing numerous guidelines and standards requiring advice on the deportation resulting from guilty pleas).

By citing and relying on *Strickland*, and applying that case to *Padilla*’s claim, the Court “broke no new ground in holding the duty to consult also extended to counsel’s obligation to advise the defendant of the immigration consequences of a guilty plea.” *United States v. Orocio*, 2011 WL 2557232 at \*6 (internal quotations omitted). The decision “is best read as merely recognizing that a plea agreement’s immigration consequences constitute the sort of information an alien defendant needs in making ‘important decisions’ affecting ‘the outcome of the plea process,’ and thereby come within the ambit of the ‘more particular duties to consult with the defendant’ required of effective counsel.” *Id.* at \*4 (citing *Strickland*, 466 U.S. at 688). Under such a reading, *Padilla* was a mere application of *Strickland* to the facts before the Court, and therefore not a “new rule.”

Following *Teague*, the early Supreme Court retroactivity cases cast the “new rule” inquiry as

whether or not “reasonable jurists” would agree that a rule was not “dictated” by precedent. *See, e.g., Butler v. McKellar*, 494 U.S. 407, 414 (1990) (“The ‘new rule’ principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.”); *see also Sawyer v. Smith*, 497 U.S. 227, 234 (1990). But this narrow conception of the “dictated” language from *Teague* is not the relevant inquiry in the *Strickland* context. “The often repeated language that *Teague* endorses ‘reasonable, good-faith interpretations’ by state courts is an explanation of policy, not a statement of law.” *Williams v. Taylor*, 529 U.S. 362, 383 (2000) (plurality) (quoting *Butler*, 494 U.S. at 414). As the Court has stated, and as the majority today recognizes, “the *Strickland* test provides sufficient guidance for resolving *virtually all* ineffective-assistance-of-counsel claims,” *id.* at 391 (opinion of the Court) (emphasis added). “[W]here the starting point is a rule of general application such as *Strickland*, ‘it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent,’ *Wright v. West*, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring). Given this clear language regarding *Teague’s* applicability in the *Strickland* context, I cannot find that the Supreme Court’s retroactivity cases where *Strickland* is not implicated compel a finding that the rule announced in *Padilla* is “new.”

In *Williams*, the Court was addressing *Strickland* under the “clearly established law” requirement of 28 U.S.C. § 2254(d)(1), which a plurality found codified *Teague’s* requirement that federal habeas courts must deny relief that is contingent upon a rule of law not

“clearly established” at the time the state conviction became final. 529 U.S. at 379-80. Parts I, III, and IV of the opinion were on behalf of a majority. The opinion of the Court stated:

It is past question that the rule set forth in *Strickland* qualifies as “clearly established Federal law, as determined by the Supreme Court of the United States.” That the *Strickland* test “of necessity requires a case-by-case examination of the evidence,” *Wright*, 505 U.S., at 308, 112 S.Ct. 2482 (Kennedy, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as “established” by this Court. This Court’s precedent “dictated” that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams’ ineffective-assistance claim . . . . And it can hardly be said that recognizing the right to effective counsel “breaks new ground or imposes a new obligation on the States.”

529 U.S. at 391 (internal citations omitted). Where such a “case-by-case examination” is required, “we can tolerate a number of specific applications without saying that those applications themselves create a new rule.” *Wright*, 505 U.S. at 308-09 (Kennedy, J., concurring).

This case is one of those “specific applications” that does not create a new rule. In applying *Strickland* to this particular set of facts, the Court found that prevailing professional norms in place at the time of the defendant’s plea required counsel to act in accordance with those norms, and that the advice required was clear and apparent. *Padilla*, 130 S. Ct. at

1482 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation . . . Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute . . .”); *see also Osagiede v. United States*, 543 F.3d 399, 409 (7th Cir. 2008) (finding *Strickland* violation for failure to comply with Article 36 of the Vienna Convention where “[t]he law was on the books; the violation was clear. Simple computer research would have turned it up”). That the *Padilla* Court began by addressing whether *Strickland* applied to Padilla’s claim is of no consequence. As the Third Circuit recognized, the true question addressed by *Padilla* is whether counsel has been constitutionally adequate in advising a criminal defendant as to whether or not to accept a plea bargain. *Orocio*, 2011 WL 2557232, at \*4. The analytical mechanism by which the Court applied *Strickland* does not detract from the fact that *Strickland* is the general test governing ineffective assistance claims, and that the *Padilla* Court did no more than recognize that removal is the type of consequence that a defendant needs to be informed of when making the decision of whether to plea.

Given how *Teague* and *Strickland* co-exist, I would not find that the concurring and dissenting views in *Padilla* compel a finding that the majority’s opinion is a “new rule.” Despite using dissenting views to inform the analysis of whether reasonable jurists could differ on whether precedent dictates a particular result, the Court has “not suggest[ed] that the mere existence of a dissent suffices to show that the rule is new.” *Beard v. Banks*, 542 U.S. 406, 416 n. 5 (2004). And where the



Court has relied on an “array of views” to find a rule “new,” the underlying case that the petitioner sought to have applied in fact had no majority opinion. *See, e.g., O’Dell v. Netherland*, 521 U.S. 151, 159 (1997) (discussing *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion), and finding that “*Simmons* is an unlikely candidate for ‘old-rule’ status. As noted above, there was no opinion for the Court.”) The existence of concurring and dissenting views does not alter the fact that the prevailing professional norms at the time of Chaidez’s plea required a lawyer to advise her client of the immigration consequences of a guilty plea. Even in light of dissenting views, “*Strickland* did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again.” *Oroció*, 2011 WL 2557232, at \*6. The concurring and dissenting opinions do not alter the straightforward application of *Strickland* that the majority engaged in. In *Padilla*, even the concurring Justices agreed that counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences.” *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring). And Justices have disagreed on whether an outcome was “dictated” by precedent where a majority found that a novel application of an old precedent was not a “new rule.” *See, e.g., Stringer v. Black*, 503 U.S. 222, 237 (1992) (holding that cases invalidating use of vague aggravating factors in capital sentencing applied to Mississippi’s capital sentencing law despite the fact that Mississippi used a different method of weighing aggravating and mitigating factors, and was therefore not a “new rule,” with three Justices dissenting).



The strongest argument that the government and majority opinion make is the unanimity among the lower courts prior to *Padilla* that the Sixth Amendment does not require counsel to warn clients of the immigration consequences of a guilty plea. The early cases, however, relied on the categorization of removal or deportation as a “collateral” consequence. See *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *United States v. Quinn*, 836 F.2d 654 (1st Cir. 1988); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. George*, 869 F.2d 333 (7th Cir. 1989); *United States v. Del Rosario*, 902 F.2d 55 (D.C.Cir. 1990); *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993). This is a classification that the *Padilla* court specifically rejected. *Padilla*, 130 S. Ct. at 1482 (finding that “because of its close connection to the criminal process,” removal is “uniquely difficult to classify as either a direct or collateral consequence”). The Court found that deportation is “intimately related to the criminal process,” and that “[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century.” *Id.* at 1481. The Court also found that “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.” *Id.* The Court therefore found it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.” *Id.* (citations omitted).

Despite the drastically changed immigration landscape following the passage of IIRIRA in 1996, more recent lower court decisions did not revisit earlier holdings regarding deportation’s collateral nature, and declined to find deportation any less

collateral. See *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000) (reaffirming *Quinn*, 836 F.2d 654 and stating that “Gonzalez has failed to persuade us that our precedents regarding the collateral nature of deportation require visitation”); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Santos-Sanchez v. United States*, 548 F.3d 327 (5th Cir. 2008). These cases, however, cannot change the fact that the Supreme Court itself “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland* . . . ,” *Padilla*, 130 S. Ct. at 1481 (citations omitted), a more relevant inquiry for *Teague* purposes. Not only did the Supreme Court never make this distinction, but in 2001 the Court stated that “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). The flaw in the collateral versus direct consequences distinction was known at the time of Chaidez’s plea. See Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell Law Review 697, 699, 703 (2002) (“The collateral consequences rule is remarkable because it has apparently been embraced by every jurisdiction that has considered it, yet it is inconsistent with the ABA standards and the practices of good lawyers as described by the Supreme Court and other authoritative sources.”). And as the majority recognizes, “the mere existence of conflicting authority does not necessarily mean a rule is new.” *Williams*, 529 U.S. at 410 (quoting *Wright*, 505 U.S. at 304 (1992)) (O’Connor, J., concurring). The only question for *Teague* purposes in the *Strickland* context

is whether counsel was constitutionally adequate in advising a criminal defendant as to whether or not to accept a plea bargain. *Orocio*, 645 F.3d at 637–38. Relying on lower court decisions to the contrary would overlook *Strickland's* straightforward language that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”—professional norms that the *Padilla* Court found had been in place for at least fifteen years prior to its holding. *Padilla*, 130 S. Ct. at 1482–83 (listing guidelines and standards that constitute the “weight of prevailing professional norms”). I would therefore not find the unanimity among the lower courts pre-dating *Padilla* “compelling” for purposes of our current *Teague* analysis.

My colleagues downplay the plain language in *Padilla* that itself signals anticipated retroactive application. The majority in *Padilla* specifically stated that its decision will not “open the floodgates” to challenges of convictions and further stated that “[i]t seems unlikely that our decision today will have a significant effect on those convictions *already* obtained as the result of plea bargains.” *Padilla*, 130 S. Ct. at 1485 (emphasis added). This floodgates argument is a clear reference to petitions such as the one at hand that challenge the past deficient performance of counsel. The Court’s use of the past tense in *Padilla* forecloses an argument that it was only referring to prospective challenges, especially when the two subsequent sentences of the opinion speak of professional norms over the “*past* 15 years” and that courts should presume that counsel satisfied their obligation “at the time their clients *considered*

pleading guilty.” *Id.* (emphasis added) (“For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea. . . . We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.”) (internal citations omitted); *see also Orocio*, 645 F.3d at 641 (“Indeed, close scrutiny of the *Padilla* opinion leads us to consider it not unlikely that the *Padilla* Court anticipated the retroactive application of its holding on collateral review when it considered the effect of its decision would have on final convictions. . . .” (sic)). Such a discussion would be unnecessary if the Court intended that *Padilla* only apply prospectively. The government argues that the floodgates discussion referred only to state post-conviction proceedings, as states are free to offer post-conviction relief without regard to *Teague*. *See Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008). However, in its floodgates discussion, the *Padilla* Court relied on research that included both state *and* federal post conviction proceedings when citing how many habeas petitions filed arise from guilty pleas. *Padilla*, 130 S. Ct. at 1485 (citing V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994)).

As the Court in *Padilla* signaled, if mere applications of *Strickland* are “old rules,” it does not necessarily follow that every petitioner will be able to take advantage of those mere applications. First, the *Padilla* Court relied on the professional norms in place at the time of plea, and the fact that *Padilla*’s counsel “could have easily determined that his plea would



make him eligible for deportation simply from reading the text of the statute. . . .” *Padilla*, 130 S. Ct. at 1482. Not every noncitizen who pled to an offense will be in that position. *Id.* at 1483 (“There will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.”) Additionally, *Strickland* also requires a showing of prejudice. *Strickland*, 466 U.S. at 694 (asking whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). Showing prejudice, much like deficient performance, is adjudicated depending on the facts of each particular case, *Padilla*, 130 S. Ct. at 1485 (“ . . . to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances”), and the fact that courts must engage in such case-by-case analysis should not influence whether or not the rule itself is “new.” *Id.* (“There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.”).

We can rest assured that defense lawyers will now advise their clients prior to pleading guilty about the immigration consequences of such a plea, as the Court has clarified that such advice is required under the Sixth Amendment. But given today’s holding, this is of no consequence to Roselva Chaidez despite the fact that professional norms in place at the time of her plea placed the same duty on her counsel. Because I find that *Padilla* simply extended the Supreme Court’s holding in *Strickland*, and itself signaled an intent to

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be applied to noncitizens in Chaidez's position, I respectfully dissent.



**APPENDIX B**

UNITED STATES DISTRICT COURT  
N.D. ILLINOIS  
EASTERN DIVISION  
UNITED STATES of America,  
*Plaintiff/Respondent,*  
v.

Roselva CHAIDEZ,  
*Defendant/Petitioner.*

No. 03 CR 636-6  
Oct. 6, 2010

**MEMORANDUM OPINION AND ORDER**

JOAN B. GOTTSCHALL, District Judge.

Petitioner Roselva Chaidez was born in Durango, Mexico in 1956. She arrived in the United States in the 1970's as an undocumented alien. Eventually, she became a permanent legal resident and now lives in Chicago with her three children and two grandchildren.

Chaidez pled guilty in December 2003 to two counts of mail fraud, and was sentenced to four years probation. (Docs. 50, 65.) Federal law provides that an alien who is "convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Because the fraud to which Chaidez pled guilty involved a loss in excess of \$10,000, the conviction made Chaidez eligible for removal from the United States. *See* 8 U.S.C. § 1101(a)(43)(M)(i) (defining "aggravated felony"). For whatever reason, the government did not initiate removal proceedings

following Chaidez's conviction. Chaidez served her sentence and continued to reside in United States.

In July 2007, Chaidez, who does not speak English, received assistance in filling out an application to obtain United States citizenship. On October 15, 2008, Chaidez was interviewed by immigration authorities about her application. At the interview, an official asked Chaidez about the fraud conviction. Chaidez had indicated on her application that she had never been convicted of any crime, but immigration officials discovered this misstatement. Chaidez was told that further investigation would have to be conducted, and she would be contacted again.

On March 26, 2009, Chaidez was served with notice to appear before an immigration judge. The notice stated that the government sought to deport Chaidez based on her conviction. When Chaidez appeared for the immigration hearing in June 2009, the judge told Chaidez that she needed an attorney and continued the hearing. Chaidez met with several attorneys and finally retained her current counsel on August 11, 2009.

On October 11, 2009, Chaidez filed a petition for writ of error coram nobis seeking to overturn the fraud conviction.<sup>1</sup> Chaidez claimed that her defense

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<sup>1</sup> As the court explained in a previous opinion:

Under the All Writs Act, 28 U.S.C. § 1651, the court has the power in a criminal case to issue a writ of coram nobis to correct errors "of the most fundamental character" that render the proceeding invalid." *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007) (quoting *United States v. Morgan*, 346 U.S. 502, 509 n. 15, 511-12 (1954)). Coram nobis is available only where Congress has provided no other

attorney, Kaaren Plant, had never informed Chaidez that deportation was a potential consequence of her guilty plea. At the time Chaidez filed her petition, Seventh Circuit law did not permit a conviction to be overturned on this basis. *See United States v. George*, 869 F.2d 333 (7th Cir. 1989). However, on March 31, 2010, the Supreme Court issued its opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), where the Court held that an attorney provides ineffective assistance of counsel when failing to warn that a guilty plea could result in deportation.

The court held a hearing on Chaidez's petition. Neither side presented much evidence. Chaidez testified that Plant never informed her that she could be deported because of the guilty plea. Chaidez claims she did not know about the immigration consequences until the government informed her that it was seeking deportation in March 2009. Chaidez stated that, if she had been properly informed, she would have insisted on going to trial. She testified that her family and her life are in the United States. Chaidez is responsible for

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remedy, such as habeas corpus. *Carlisle v. United States*, 517 U.S. 416, 429 (1996). Because one requirement of a writ of habeas corpus is that the petitioner be in custody, *see* 28 U.S.C. § 2255, coram nobis would be the appropriate remedy where the petitioner was fined rather than given a custodial sentence or, in situations like this one, where the petitioner has already completed a term of custody. *United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988). The petitioner must demonstrate that she had "sound reasons for the failure to seek earlier relief," and that she "continues to suffer from [her] conviction even though [s]he is out of custody." *Sloan*, 505 F.3d at 697.

*United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 2740282, at \*1 (N.D. Ill. July 8, 2010).

caring for her grandchildren while her daughter works. Chaidez testified that she would have done everything possible to remain in the United States, even though she would have risked harsher punishment and deportation should the government have prevailed at trial.

At the time she represented Chaidez, Plant was serving as an attorney with the Federal Defender Program. In December 2009, Plant died of lung cancer, and the government never had an opportunity to interview Plant about her representation of Chaidez. The government did examine Plant's attorney file, but it contained little information other than a notation that Plant met with Chaidez two times, once for two and a half hours before the change of plea and once before the sentencing.

## II. ANALYSIS

As this court explained in its two previous opinions, *see United States v. Chaidez*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 3184150 (N.D. Ill. Aug. 11, 2010); *United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 2740282 (N.D. Ill. July 8, 2010), Chaidez is entitled to relief if she can show the following: (1) Plant failed to inform Chaidez of the immigration consequences of pleading guilty to an aggravated felony, (2) had Chaidez been properly informed, she would not have pled guilty, and (3) Chaidez has sound reasons for failing to challenge her conviction sooner. The first two requirements are the familiar two-step analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), for determining whether a defendant is entitled to relief for ineffective assistance of counsel. The third requirement comes from the law of coram nobis. A writ of coram nobis has no statute of limitations, but the

doctrine of laches does apply. *United States v. Darnell*, 716 F.2d 479, 480-81 (1983).

Chaidez bears the “heavy burden” of showing she is entitled to relief. *Id.* at 481 n. 5. Because the standard practice in 2003 was for attorneys to inform their clients of immigration consequences of guilty pleas, the court should “presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.” *Padilla*, 130 S. Ct. at 1485. And the court reviews the proceedings under “a standard akin to ‘actual prejudice.’” *Darnell*, 716 F.2d at 481 n. 5. Chaidez must show that but for her attorney’s error, she would have gone to trial. “Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, 130 S. Ct. at 1485.

Chaidez’s testimony is unrebutted in two respects: first, that Plant did not provide advice about the immigration consequences of a guilty plea, and, second, that Chaidez would have gone to trial had she known the truth. Of course, “[n]o ‘unrebutted’ but noncredible testimony needs to be given any weight by the factfinder.” *In re Schmitt Farm Partnership*, 161 B.R. 429, 432 (N.D. Ill. 1993); accord *Lerch v. C.I.R.*, 877 F.2d 624, 631-32 (7th Cir. 1989). The government cross-examined Chaidez in an attempt to discredit her testimony. Chaidez admitted on the stand that many of the statements in her affidavit were incorrect.<sup>2</sup>

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<sup>2</sup> For example the affidavit states that, “[Plant] never inquired of me my legal status in the United States, and I did not inform her that I was a lawful permanent resident.” (Aff. ¶ 7.) At the hearing, Chaidez testified that Plant was aware that Chaidez was a permanent resident. The affidavit also contains



However, these errors appear to reflect sloppy lawyering in preparing the affidavit rather than a calculated effort to deceive the court. In addition, Chaidez noted on her immigration application that she had never been convicted of a crime. But Chaidez does not speak English, and she filled out the application with the assistance of non-lawyers. When confronted by immigration officials, she admitted that she had been convicted of mail fraud. Although recognizing that Chaidez has some incentive to lie, the court believes Chaidez testified truthfully at the hearing. The government did not impeach Chaidez's testimony on the critical issues.

First, the court finds that Plant did not warn Chaidez that her guilty plea could carry immigration consequences. Although the court should presume that Plant generally followed her duty to provide competent advice, the unrebutted, credible evidence is that Plant failed to do so in this case.

Second, the court finds that, had Chaidez known of the immigration consequences, she would not have pled guilty. Chaidez entered her guilty plea without the benefit of a plea agreement. Her guideline range at sentencing was 0-6 months, and she received a sentence of probation. Had Chaidez not received a reduction of two offense level points for acceptance of responsibility, her guideline range would have been 6-12 months. U.S.S.G. § 5A (2003). A sentence of probation would not have been possible, *Id.* § 5B1.1, because mail fraud is a Class B felony, *see* 18 U.S.C. §

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inaccuracies concerning the dates that Chaidez applied for citizenship and received notice to appear before an immigration judge. (*See* Aff. ¶¶ 14, 18.)



3559(a)(2) (classifying as Class B felonies crimes with a maximum term of imprisonment of twenty-five years or more); 18 U.S.C. § 1341 (setting a maximum term of imprisonment of thirty years for mail fraud). Although refusing to plead guilty may have resulted in Chaidez serving a term of imprisonment, she testified that she would have been willing to risk prison and deportation in order to fight the charges and try to remain in the United States with her family. At the *coram nobis* hearing, the government did not introduce any evidence to contradict this testimony. The court does not have any independent knowledge about the strength of government's evidence against Chaidez or whether any of Chaidez's co-defendants would have testified against her. Taking Chaidez's testimony as the only evidence, and crediting in particular her testimony that the risk of some jail time was worth the chance to avoid deportation, the court finds that it would have been rational under the circumstances for Chaidez to insist on a trial.

Finally, the government argues that laches should bar Chaidez's *coram nobis* petition. Chaidez was warned in March 2009 that the government sought to deport her because of her fraud conviction. Chaidez first filed her *coram nobis* petition in October 2009.<sup>3</sup> The government contends that Chaidez's seven month delay was prejudicial because Plant died in December

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<sup>3</sup> The petition was originally filed as part of a separate civil case. (See Case No. 09 CV 6372.) In January, Judge Holderman dismissed the case and ordered Chaidez to file the petition as part of her original criminal case. Chaidez filed her petition with this court on January 25, 2010. (Doc. 171.) At a motion hearing, the court ordered Chaidez to file a corrected petition (Doc. 175), which she did on March 23, 2010 (Doc. 178).

2009. However, the court finds that Chaidez was reasonably diligent in bringing her claim. Chaidez did not fully understand the notice she received in March 2009. She did not speak English and did not have an attorney. After the immigration judge suggested Chaidez obtain counsel, she met with multiple attorneys. She found her current counsel in August 2009, and the petition was filed in October 2009. In addition, it is difficult to assess whether or not the government was actually prejudiced. Although it is true that Plant is unavailable to testify, the government did not put on any evidence suggesting that Plant would have testified favorably. For instance, the government might have tried to contact the interpreter who sat in on the meetings between Plant and Chaidez; the court does not know whether the government attempted to do so. The government also could have sought testimony from other federal defenders to see if that office had a practice in 2003 of informing defendants about immigration consequences. Given Chaidez's reasonable diligence and a lack of evidence of any prejudice, laches should not bar her claim.

### III. CONCLUSION

Chaidez's petition for writ of error coram nobis is granted. Chaidez's conviction is vacated.

**APPENDIX C**

**UNITED STATES DISTRICT COURT  
N.D. ILLINOIS  
EASTERN DIVISION**

**UNITED STATES of America,  
*Plaintiff/Respondent,*  
v.**

**Roselva CHAIDEZ,  
*Defendant/Petitioner.***

**No. 03 CR 636-6  
Aug. 11, 2010**

**MEMORANDUM OPINION AND ORDER**

**JOAN B. GOTTSCHALL, District Judge.**

**I. BACKGROUND**

Defendant/Petitioner Roselva Chaidez, a lawful permanent resident of the United States, filed a petition for writ of error coram nobis complaining that neither this court nor her attorney informed her of the immigration consequences of pleading guilty to federal charges of mail fraud. (Doc. 178.) Chaidez pled guilty on December 3, 2003 (Doc. 50), and the court sentenced her to four years of probation (Doc. 65). On October 11, 2009, Chaidez filed her petition as a separate civil case. Chief Judge James Holderman dismissed the case and instructed Chaidez to refile her petition as part of the original criminal case before this court. (See Case No. 09 C 6372, Doc. 3.) Chaidez filed her petition as a motion on January 25, 2010. (Doc. 171.) She filed a corrected petition on March 23, 2010. (Doc. 178.) Just one week later, the Supreme Court

issued its decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding that a habeas petitioner could bring a claim for ineffective assistance of counsel where he would not have pled guilty but for the failure of his attorney to advise him of the immigration consequences of the plea.

In a previous opinion, this court explained that Chaidez would need to provide additional factual detail in order for the court to assess her claim under *Padilla*. *United States v. Chaidez*, No. 03 CR 636-6, 2010 WL 2740282, at \*2 (N.D. Ill. July 8, 2010). Chaidez has now submitted an affidavit filling in some of the gaps. (*See* Doc. 188.) If it appears from the affidavit that Chaidez can make out her claim, the government has requested a hearing to establish what Chaidez knew about the possibility of deportation at the time her guilty plea.

## II. ANALYSIS

### A. Retroactivity

The government in its supplemental response argued that *Padilla* could not be applied retroactively in Chaidez's collateral attack on her guilty plea. The court concluded that Chaidez did not seek retroactive application of *Padilla*. Rather, the court stated, it need only apply the well-established rule in *Strickland v. Washington*, 466 U.S. 668 (1984). *Chaidez*, 2010 WL 2740282, at \*2. Upon further consideration, the court is convinced that the issue is not so straightforward, and more thorough analysis is required. Thus, as an initial matter, the court reconsiders sua sponte its ruling on retroactivity.

Only a few courts have yet weighed in on the question of *Padilla's* retroactive application. Some

courts have found that the decision may be applied to convictions which became final before March 31, 2010, the date the *Padilla* decision was announced, and so is applicable retroactively. See *United States v. Hubenig*, No. 6:03-mj-040, 2010 WL 2650625, at \*8 (E.D. Cal. July 1, 2010); *People v. Bennett*, 906 N.Y.S.2d 696, 700 (N.Y. Crim. Ct. 2010). Other courts have reached the opposite conclusion. *Gacko v. United States*, No. 09-CV-4938 (ARR), 2010 WL 2076020, at \*3 (E.D.N.Y. May 20, 2010); *People v. Kabre*, No. 2002NY029321, 2010 WL 2872930, at \*10 (N.Y. Crim. Ct. July 22, 2010).

The Supreme Court's landmark decision in *Teague v. Lane*, 489 U.S. 288 (1989), limited the ability of courts to hear constitutional challenges to convictions on collateral review.<sup>1</sup> *Teague* clarified that a criminal defendant seeking to collaterally attack a conviction may not rely on a new constitutional rule of criminal procedure identified only after the date that the conviction became final.<sup>2</sup> *Id.* at 310. A conviction

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<sup>1</sup> Neither the Supreme Court nor the Seventh Circuit has determined whether the retroactivity rule of *Teague* applies to a coram nobis petition. What precedent exists regarding coram nobis has generally cited to post-conviction cases. See Larry W. Yackle, *Postconviction Remedies* § 7:27 (Thomson Reuters 2010). Other circuits have applied *Teague* in coram nobis cases. See *United States v. Mandanici*, 205 F.3d 519, 527 (2d Cir. 2000); *United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997). And the Seventh Circuit has stated that, "A writ of error coram nobis affords the same general relief as a writ of habeas corpus." *Howard v. United States*, 962 F.2d 651, 653 (7th Cir. 1992). The court will follow the Second and Eleventh Circuits and apply *Teague* in this case.

<sup>2</sup> Although *Teague* was a plurality opinion, a majority of the court quickly adopted the rule announced in that case. See *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), *overruled on other grounds by*



becomes final after the judgment of conviction is rendered, the availability of direct appeal is exhausted, and the time for filing a petition for certiorari has elapsed. *Id.* at 295.

The *Teague* analysis generally turns on whether a particular decision announced a new rule or merely applied an old rule in a new context.<sup>3</sup> When the Court overturns its own prior precedent, clearly a new rule is established. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). “[I]t is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases.” *Id.*; accord *Teague*, 489 U.S. at 301. The *Teague* Court elaborated:

Generally . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal

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*Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>3</sup> There are two exceptions to the *Teague* rule. First, “a new rule should be applied retroactively if it places ‘certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe.’” *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)). *Padilla* clearly does not fit within this exception because that decision dealt with an attorney’s duty to inform the client about the consequences of a guilty plea; it did not contain any holding about the power of the court to impose a judgment of conviction based on a particular crime. Second, courts may retroactively apply “watershed rules of criminal procedure.” *Id.* The Supreme Court has made clear that this is a narrow exception for rules that are “central to an accurate determination of innocence or guilty.” *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005) (noting that the Supreme Court has never applied the second *Teague* exception); see also *United States v. Mandanici*, 205 F.3d 519, 528-29 (2d Cir. 2000) (collecting Supreme Court cases rejecting application of second *Teague* exception).

Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

*Id.* (emphasis in original).

The “dictated” language from *Teague* suggests a broad interpretation of what constitutes a new rule. Whenever uncertainty might exist about how a certain holding applies to a new context, then it could be said that the holding does not “dictate” the particular application. But the Supreme Court has not found that every novel application of an old precedent results in the announcement of a new rule. *See, e.g., Stringer v. Black*, 503 U.S. 222, 237 (1992) (holding that cases invalidating use of vague aggravating factors in capital sentencing applied to Mississippi’s capital sentencing law despite the fact that Mississippi used a different method of weighing aggravating and mitigating factors); *Penry*, 492 U.S. at 318-19 (holding that as-applied challenge to Texas death penalty statute did not seek application of new rule, despite earlier Supreme Court opinion rejecting facial challenge to the same statute). In *Penry* and *Stringer*, the Court determined that the results were “dictated” by law that existed at the time of the petitioner’s conviction. Yet, neither of these decisions was unanimous. In each, Supreme Court Justices disagreed about the logical reach of the Court’s earlier precedents.

In its habeas corpus jurisprudence, the Court has maintained a distinction between a court’s statement of the law and its application of the law to a new set of facts. *See Williams v. Taylor*, 529 U.S. 362, 410-12 (2000). Under *Teague*, a novel statement of law will be

considered a new rule while a new application of the rule will not. *Butler v. McKellar*, 494 U.S. 407, 414-15 (1990); *see also Thomas v. Gilmore*, 144 F.3d 513, 516 (7th Cir. 1998) (holding that petitioner seeking per se rule that counsel must subpoena all institutional records in capital cases would be barred by *Teague*, “but that leaves open the possibility that his lawyer failed to come up to minimum professional standards by not subpoenaing the records in the particular circumstances of *this* case”) (emphasis in original). This distinction is admittedly a murky one. The discovery of a new rule will depend entirely upon the level of generality at which the court defines the new holding. *See Wright v. West*, 505 U.S. 277, 311 (1992) (Souter, J., concurring).

The holding in *Padilla* is an extension of the rule in *Strickland*. *Strickland* held that a defendant could have his conviction reversed if he could show that his counsel’s representation “fell below an objective standard of reasonableness,” and that deficiency prejudiced the defendant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 687-88, 694.<sup>4</sup> The question for this court is whether *Padilla* announced a new rule, as defined by *Teague*, or whether the Court merely applied *Strickland* to new facts.

*Padilla* could be described as establishing a per se

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<sup>4</sup> The Court in *Padilla* was asked to address only the first half of the *Strickland* analysis. The Court left open the question of whether petitioner had been prejudiced by his counsel’s ineffective assistance. *Padilla*, 130 S. Ct. at 1483-84.

rule that counsel must inform a client of immigration consequences before an informed guilty plea may be entered. Alternatively, the case can be read as a straightforward application of *Strickland*: the petitioner's attorney "fell below an objective standard of reasonableness," because, as a factual matter, the professional standards at the time of the client's plea required counsel to inform of potential immigration consequences.

Both of these potential readings have some appeal. The government points out that the language of the opinion suggests the Justices recognized the novelty of its holding. *Padilla*, 130 S. Ct. at 1486 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation."); *id.* at 1488 (Alito, J., concurring) ("[T]his Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about [collateral consequences of a conviction].") As one court recently observed in declaring that *Padilla* would not apply retroactively, the Supreme Court's decision effectively changed the law in nine circuits and the majority of states. *Kabre*, 2010 WL 2872930, at \*4-5. Every circuit to have addressed the issue, including the Seventh Circuit, had concluded that deportation is a collateral consequence of a conviction and counsel is not ineffective for failing to warn the client about the potential immigration consequences of conviction. *Id.* at 892-93 (citing *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000); *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973); *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993); *United States v.*

*George*, 869 F.2d 333 (7th Cir. 1989); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985)).<sup>5</sup> These decisions are strong support for the proposition that *Padilla* announced a new rule. See *Butler*, 494 U.S. at 415.

Nevertheless, as the Supreme Court stated in *Williams*, “[e]ven though we have characterized the new rule inquiry as whether ‘reasonable jurists’ could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes the new rule is ‘objective,’ and the mere existence of conflicting authority does not necessarily mean a rule is new.” 529 U.S. at 410 (quoting *Wright*, 505 U.S. at 304). *Padilla* did not overturn any prior decision of the Supreme Court. *Padilla*, 130 S. Ct. at 1481 (“We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.”). Justice Stevens’s majority opinion in *Padilla* relied primarily on citations to *Strickland* itself as well as secondary sources discussing prevailing professional norms at the time of *Padilla*’s plea. *Id.* at 1482-83. And the Court noted its longstanding reliance on “[p]revailing norms of practice as reflected in American Bar

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<sup>5</sup> Before *Padilla* there was a split among the circuits on the question of whether counsel is ineffective in affirmatively providing incorrect information about immigration consequences. See *Padilla*, 130 S. Ct. at 1484. The Court held that an attorney can be ineffective both for misleading her client and for failing to provide any advice. *Id.* Chaidez does not aver that she was misled, but rather that her attorney provided no information about immigration consequences.



Association standards and the like” to determine the extent of professional obligations in the *Strickland* analysis. *Id.* at 1482. The Court also noted that the extent of the advice counsel is required to give will be entirely fact-dependent. *Id.* at 1483. The law in Padilla’s case was straightforward. But often the immigration consequences will be less clear, and counsel is not required to know every intricacy of immigration law. *Id.*

Further, the Court has noted that “the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims.” *Williams*, 529 U.S. at 391. In discussing a different type of claim, Justice Kennedy wrote:

Whether the prisoner seeks the application of an old rule in a novel setting, depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.

The rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that

yields a result so novel that it forges a new rule, one not dictated by precedent.

*Wright*, 505 U.S. at 308-09 (Kennedy, J., concurring) (citations omitted); *cf. Bousley v. United States*, 523 U.S. 614, 619-20 (1998) (rejecting application of *Teague* to claim that guilty plea was not knowing and intelligent because, even though intervening Supreme Court authority provided the reason for questioning the validity of the plea, “[t]here is surely nothing new about this principle”).

Justice Kennedy’s analysis applies equally to *Strickland* claims. In *Osagiede v. United States*, 543 F.3d 399, 408 n.4 (7th Cir. 2008), the Seventh Circuit rejected the argument that *Teague* prevented a habeas petitioner from arguing that his counsel had been ineffective for failing to seek a remedy under Article 36 of the Vienna Convention. The court, quoting Justice Kennedy’s concurrence in *Wright*, held that, although the petitioner cited no previous cases where *Strickland* claims had succeeded under this theory, an application of *Strickland* in this novel context did not create a new rule. *Id.* The court relied on the fact that “a reasonable Illinois lawyer would have known” that Article 36 created individual rights. *Id.* at 409-10.

Thus, the only question for this court is whether this is “the infrequent [*Strickland*] case that yields a result so novel that it forges a new rule.” *Id.* at 408 n.4. It is a close question, but the court is convinced that *Padilla* did not announce a new rule for two reasons. First, the petitioner in *Padilla* brought a collateral challenge to his conviction.<sup>6</sup> Thus, if Chaidez’s claim is

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<sup>6</sup> Jose Padilla pled guilty to three drug-related charges; final judgment was entered on October 4, 2002. Padilla filed for post-

barred by *Teague*, Padilla's claim should have been barred as well. Prior to the decision in *Teague*, the Supreme Court would regularly announce new rules but not address the issue of retroactivity until subsequent cases. *Teague*, 489 U.S. at 302-03. This procedure led to "unequal treatment of those who were similarly situated." *Id.* at 303. The *Teague* Court declared that, going forward, the issue of retroactivity should be decided as a threshold question on collateral review, before addressing any constitutional claim. *Id.* at 305. Reaching out to decide constitutional questions on collateral review, even though the rule proposed by a petitioner could not be applied retroactively, would threaten "the integrity of judicial review" by "assert[ing] that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 304 (quoting *Mackey*, 401 U.S. at 679). Although the government may waive the issue of retroactivity, a court can raise it sua sponte. *Thomas*, 144 F.3d at 516. In *Teague*, the government did not argue retroactivity, but the Court felt compelled to decide the case on those grounds. In *Padilla*, despite three separate opinions, no member of the Court even mentioned *Teague* or any retroactivity issue. In fact, as two courts have noted, the majority opinion stated that "it had 'given serious consideration' to the argument that its ruling would open the 'floodgates' to new litigation challenging prior guilty pleas." *Hubenig*, 2010 WL 2650625, at \*7

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conviction relief in state court on August 18, 2004. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008). The Supreme Court of Kentucky eventually ruled that Padilla was not entitled to relief, *id.* at 485, and Padilla appealed that decision to the U.S. Supreme Court.

(quoting *Padilla*, 130 S. Ct. at 1484-85); accord *Bennett*, 903 N.Y.S.2d at 700. The Court stated:

It seems unlikely that our decision today will have significant effect on those *convictions already obtained* as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea.

*Padilla*, 130 S. Ct. at 1485 (emphasis added). "If the Court intended *Padilla* to be a new rule which would apply only prospectively, the entire 'floodgates' discussion would have been unnecessary." *Hubenig*, 2010 WL 2650625, at \*7.

Second, application of *Padilla* in cases like this one continues to promote the finality of judgments, which is the purpose behind the rule in *Teague*, see *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring), while balancing the need to provide meaningful review of constitutional errors resulting in uninformed guilty pleas. A post-conviction court applying *Strickland* is bound to consider whether counsel's assistance was effective with reference to professional standards *as they existed at the time of the conviction*. *Conner v. McBride*, 375 F.3d 643, 656 (7th Cir. 2004). Critical to the Court's decision in *Padilla* was the fact that professional legal standards had long required criminal attorneys to inform their clients of immigration consequences. 130 S. Ct. at 1482-83. The Supreme Court, itself, recognized as early as 2001 that immigration consequences of guilty pleas would be critically important to defendants and that "competent defense counsel, following the advice of numerous practice guides" would be expected to

advise clients of the opportunity for discretionary relief from rules permitting deportation. *INS v. St. Cyr*, 533 U.S. 289, 323 & n.50 (2001). In *Rompilla v. Beard*, 545 U.S. 374 (2005), a habeas case, the Court held that counsel had been ineffective in failing to examine certain mitigating evidence. The majority rejected the contention of dissenters that the opinion created a “rigid, *per se*” rule that could not be considered on collateral attack. *Id.* at 389. That decision, like \*904 the one in *Padilla*, relied heavily on ABA professional standards in concluding that counsel’s representation had fallen below an objective standard at the time of conviction. *Id.* at 387.

The Supreme Court has employed a “functional view of what constitutes a new rule.” *Saffle*, 494 U.S. at 488. To make out a *Strickland* claim, a criminal defendant will generally be required to bring in evidence that has not been made part of the record. *United States v. Fish*, 34 F.3d 488, 491 n.1 (7th Cir. 1994). On direct review, an appellate court generally cannot consider this additional evidence. *Id.* Thus the court hearing the *Strickland* claim in a collateral attack on a federal conviction will serve a function similar to the appellate court, by being the first to reconsider the work done by the trial court. This function will be especially important in cases like this one. Chaidez pled guilty, allegedly relying on the ineffective advice of counsel. She received a sentence of four months probation and, rightly, saw no reason to seek a direct appeal. Only when the immigration consequences of her plea became clear years later, after the opportunity for appeal had long since past, did she seek to challenge the plea. Virtually all criminal defendants with *Padilla* claims are likely to



have had little reason to appeal their own guilty pleas. If the Supreme Court had refused on retroactivity grounds to reach the constitutional claim in *Padilla*, no court would ever have been able to establish that counsel must advise about immigration consequences of a guilty plea. The likelihood of the issue arising on direct appeal would have been miniscule.

Accordingly, the court holds that *Padilla* did not announce a new rule for *Teague* purposes and affirms its earlier opinion that no retroactivity problem is raised by petitioner's claim.

### **B. Chaidez's Affidavit**

The court now turns to a review of the affidavit submitted by Chaidez. In its previous opinion, the court explained that coram nobis relief is available only where petitioner can show: 1) there was an error "of the most fundamental character," 2) there are "sound reasons for the failure to seek earlier relief," and 3) the petitioner "continues to suffer from [her] conviction even though [s]he is out of custody." *Chaidez*, 2010 WL 2740282, at \*2. As the court previously held, Chaidez can satisfy the first element of this test by showing that her defense attorney provided ineffective assistance. *Id.* at \*2-3. Chaidez's affidavit states that her attorney "never informed me that as a non-U.S. Citizen, a lawful permanent resident was subject to removal or deportation from the United States for committing any aggravated felony without any form of relief available to me." (Aff. ¶ 8.) Chaidez also states that had the attorney explained the immigration consequences, Chaidez would not have pled guilty. (*Id.* ¶ 10.)

Next, the court held that Chaidez could establish the second element of the *coram nobis* standard by showing that she had a good reason for waiting until now to raise the issue. *Chaidez*, 2010 WL 2740282, at \*4-5. The affidavit states that she “first became aware of my immigration troubles quite by accident in early 2009.” (Aff. ¶ 14.) Chaidez avers that she learned that she could be deported only after she attempted to apply for citizenship (*id.* ¶¶ 15-18), just a few months before she first sought relief from her conviction.<sup>7</sup>

Finally, the court held that Chaidez could establish the third element of the *coram nobis* standard because she pled guilty to a crime for which federal law permits the Attorney General to seek deportation. *Chaidez*, 2010 WL 2740282, at \*4. And, in fact, Chaidez alleges that the government has initiated removal proceedings against her. (Aff. ¶ 18.)

Now that Chaidez has established a legally sufficient claim for relief, she is entitled to an

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<sup>7</sup> Chaidez’s affidavit contains an apparent inconsistency. She states:

18. Then on or about December 2009, I received a Notice to Appear before an immigration judge for removal proceedings.

19. I immediately contacted my U.S. Probation Officer, Juan Tappia, who gave me the name of my current immigration lawyer, Gerardo Gutierrez.

(Aff. ¶¶ 18-19.) This suggests that Chaidez did not meet with her attorney until at least December; however, she first filed her petition through counsel in October 2009. Nevertheless, the affidavit also states that Chaidez first learned of the possibility of deportation in “early 2009,” and the court relies on that factual averment in concluding that Chaidez may be able to satisfy the requirements of *coram nobis*.

evidentiary hearing.<sup>8</sup> See *United States v. Bejacmar*, 217 Fed. Appx. 919, 921 (11th Cir. 2007) (quoting *Aron v. United States*, 291 F.3d 708, 714 n.5 (11th Cir. 2002)) (where coram nobis petitioner “alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim”); *United States v. Liska*, 409 F. Supp. 1405, 1406 (E.D. Wis. 1976) (“Where . . . the [coram nobis] petitioner has alleged in a sworn affidavit facts which, if true, might well entitle him to some form of relief, it would be improper to deny him a hearing on his claim.”). Chaidez should be prepared to present evidence on all elements of her claim, and the government will be permitted to cross examine petitioner and present any evidence contradicting the facts as alleged by Chaidez. Chaidez faces a heavy burden, because counsel is presumed effective. *Fish*, 34 F.3d at 491. Chaidez must show that counsel’s performance “fell below an objective standard of reasonableness,” and “there exists ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*

### III. CONCLUSION

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<sup>8</sup> At a court appearance on August 11, 2010, the government sought permission to file a response to Chaidez’s affidavit. The court ordered the response by August 23, 2010. (Doc. 192.) If the government points to any deficiencies with the affidavit that are not noted by the court, the court may reconsider this section of the opinion at that time.

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For the reasons stated above, Chaidez is entitled to a hearing on her claim of ineffective assistance of counsel.

**APPENDIX D**

**UNITED STATES COURT OF APPEALS**

**For the Seventh Circuit**

**Chicago, Illinois**

**November 30, 2011**

**Before**

**WILLIAM J. BAUER, *Circuit Judge***

**JOEL M. FLAUM, *Circuit Judge***

**ANN CLAIRE WILLIAMS, *Circuit Judge***

**No. 10-3623**

**ROSELVA CHAIDEZ,**

***Petitioner-Appellee,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondent-Appellant.***

**Appeal from the United  
States District Court**

**for the Northern District of  
Illinois, Eastern Division.**

**No. 1:03-cr-00636-6**

**Joan B. Gottschall,**

***Judge***

**ORDER**

On consideration of the petition for rehearing and petition for rehearing en banc filed by the appellee in the above case on September 27, 2011, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny the petition.<sup>1</sup> The petition is therefore **DENIED.**

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<sup>1</sup> Circuit Judge Ann Claire Williams voted to grant panel rehearing.



# **REPLY BRIEF**

IN THE  
**Supreme Court of the United States**

ROSELVA CHAIDEZ,  
*Petitioner,*  
v.  
UNITED STATES OF AMERICA,  
*Respondent.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

**REPLY BRIEF FOR PETITIONER**

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Charles Roth  
Claudia Valenzuela  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle Street  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave., N.W.  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

## REPLY BRIEF FOR PETITIONER

The Government's acquiescence makes clear that certiorari should be granted: "this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals." U.S. Br. 8. Even on the merits, the Government concedes that this Court's analysis in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), of "how" *Strickland v. Washington*, 466 U.S. 668 (1984), applies with respect to deportation advice did not break any new ground. U.S. Br. 16-17. The Government nonetheless argues, for three reasons, that *Padilla* should not apply to convictions that became final before its announcement. Petitioner files this reply brief to clarify her position in response to these arguments.

First, the Government contends that even though there is nothing new in *Padilla* concerning "how" *Strickland* applies to claims of deficient assistance of counsel, *Padilla* broke new ground concerning an "antecedent question" – namely, "whether" the Sixth Amendment applies to assistance regarding deportation consequences of guilty pleas. U.S. Br. 17. This purported distinction is unpersuasive. *Strickland* explained that the adequacy of an attorney's performance during a criminal proceeding should be judged "under prevailing professional norms," 466 U.S. at 688, and this Court made clear long before *Padilla* that this rule applies to advice relating to guilty pleas, see *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The *Padilla* Court merely applied this law to the professional norms that obligated defense counsel to advise clients when pleading guilty might trigger deportation. See

130 S. Ct. at 1481-82. As this Court explained, the question of whether a plea will lead to deportation is central to a client's decision making, and this Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Padilla*, 130 S. Ct. at 1481. *Padilla*, in other words, simply declined to create an exception to *Strickland*'s prior rule requiring reasonable professional assistance in connection with guilty pleas; it did not impose any "new obligation" on states or the federal government. *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion).\*

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\* The Government's suggestion that this Court will have to assume at the merits stage that *Teague* governs here (U.S. Br. 10 n.2) is incorrect. The question whether *Teague*'s framework applies when a person challenges a *federal* conviction based on ineffective assistance of counsel is fairly included within the question presented, *see* Pet. i, and holding that a less restrictive retroactivity regime governs in this setting would be one way of resolving the circuit split at issue. Given these circumstances, it is unnecessary for petitioner to have pressed this specific argument below. *See, e.g., Martinez v. Ryan*, No. 10-1001 (March 20, 2012), at 1-2, 5-6; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). But, in fact, petitioner did raise this argument in a timely manner, contending in her petition for rehearing en banc that even if *Padilla*'s holding constitutes a new rule, *Teague*'s "new rule" regime is too strict in this context. Pet'n for Reh'g En Banc 10-14. That argument could be raised only pursuant to en banc procedures because the Seventh Circuit – like every other court of appeals – had previously held that *Teague* applies to federal prisoners. *See Danforth v. Minnesota*, 552 U.S. 264, 281 n.16 (2008); *Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994).

Second, the Government argues that *Padilla* should not apply retroactively because there was a dissent in that case and two Justices in the seven-Justice majority called the majority opinion a “dramatic departure from precedent.” U.S. Br. 16 (quoting 130 S. Ct. at 1488 (Alito, J., concurring in the judgment)). But “the mere existence of a dissent” does not “suffice[] to show that the rule is new.” *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004); see also Pet. 24. Furthermore, the concurrence’s characterization of the majority’s opinion was directed at an aspect of the opinion that is irrelevant here – the requirement that attorneys give *detailed* or *definitive* advice concerning immigration consequences. See *Padilla*, 130 S. Ct. at 1483; *id.* at 1487 (Alito, J., concurring in the judgment). The specificity of advice required under *Padilla* is not at issue in this case (nor in the others like it in the circuit split); this case turns on *Padilla*’s more basic holding that “silence alone is not enough to satisfy counsel’s duty to assist the client.” *Id.* at 1494 (Alito, J., concurring in the judgment). The concurring Justices, as the foregoing quotation indicates, did not describe that holding as a departure from prior precedent. To the contrary, they agreed that, under *Strickland*, counsel must at least “advise[] the client that a criminal conviction may have adverse consequences under immigration laws.” *Id.*

Third, the Government asserts that *Padilla* rejected a substantial body of precedent in the courts of appeals. U.S. Br. 13 (citing cases). Not so. Only three of the cases the Government cites postdated both the enactment of IIRIRA and this Court’s holding in *INS v. St. Cyr*, 533 U.S. 289 (2001), which were critical to the *Padilla* Court’s analysis. See Pet.



23-24. On the other hand, three courts of appeals had held as of the time of *Padilla* that immigration advice concerning the effect of a guilty plea fell within the scope of *Strickland*, at least insofar as such advice was incorrect. *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *United States v. Cuoto*, 311 F.3d 179 (2d Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534 (11th Cir. 1985). That view was so well grounded in law that the Government, when given the opportunity, did not even challenge it. See Br. for U.S. as Amicus Curiae 25, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (agreeing that “misadvice on immigration consequences can rise to the level of deficient performance under *Strickland*”).

Accordingly, *Padilla* did not extend the scope of *Strickland* beyond any meaningful boundaries that existed in the lower courts. Instead, *Padilla* simply insisted that a couple of stray courts of appeals (as well as the Kentucky Supreme Court) comply with the Sixth Amendment’s “fundamental principle[]” that a criminal defendant may be entitled to more than his lawyer’s silence before accepting a guilty plea. *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., concurring). In light of that unremarkable holding, persons such as petitioner should be able to benefit from *Padilla*’s holding.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Charles Roth  
Claudia Valenzuela  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle Street  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave., N.W.  
Suite 404  
Washington, DC 20015

April 2012

Respectfully submitted,

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

**AMICUS  
CURIAE  
BRIEF**

RECORD  
AND  
SERIAL

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

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ROSELVA CHAIDEZ,  
*Petitioner,*  
  
v.  
  
UNITED STATES,  
*Respondent.*

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*On Petition for Writ Of Certiorari To The United  
States Court Of Appeals For The Seventh Circuit*

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**BRIEF AMICUS CURIAE OF  
CONSTITUTIONAL ACCOUNTABILITY  
CENTER IN SUPPORT OF THE PETITION**

---

DOUGLAS T. KENDALL  
ELIZABETH B. WYDRA  
*Counsel of Record*  
CONSTITUTIONAL  
ACCOUNTABILITY  
CENTER  
1200 18th St., NW, Ste 1002  
Washington, D.C. 20036  
(202) 296-6889  
elizabeth@theusconstitution.org  
  
*Counsel for Amici Curiae*

Supreme Court  
Library

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment, as applied to the States through the Fourteenth Amendment, when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. Does this ruling apply retroactively to persons whose convictions became final before its announcement?



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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

CAC works to defend constitutional protections for non-citizen immigrants as well as for citizens. CAC filed an *amicus curiae* brief in support of the petitioner in *Padilla v. Kentucky* and has an interest in seeing that *Padilla's* protection of the right to assistance of counsel required by the Sixth Amendment is applied retroactively.

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<sup>1</sup> The parties' letters of consent to the filing of this brief have been filed with the Clerk; notice was provided to the parties more than ten days prior to this filing. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.



## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, this Court applied the analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel's misadvice regarding the immigration consequences of a guilty plea fell below the constitutionally required level of effective assistance of counsel in criminal proceedings. 130 S. Ct. 1473 (2010). Applying the first prong of the *Strickland* analysis—which asks whether counsel's representation “fell below an objective standard of reasonableness,” 466 U.S. at 688—the Court in *Padilla* held that a lawyer's failure to inform her client whether his plea carries a risk of deportation falls below the constitutional minimum. This holding did not announce a new rule. Rather, it reflected the Constitution's guarantee that no criminal defendant—citizen or not—shall be deprived of the effective assistance of counsel. Nonetheless, the court below held that *Padilla* announced a “new rule,” and thus, under this Court's jurisprudence, would not be applied retroactively. The Court should grant the Petition to resolve the split among the circuits on this issue, and make clear that *Padilla* applies retroactively.

The Sixth Amendment's guarantee of the right to assistance of counsel is plainly not limited to citizens, but rather provides protection to the broader category of “the accused.” U.S. CONST. amend. VI. The Fourteenth Amendment, which applied the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further established the

Constitution's protections for non-citizens in our nation's criminal justice system by requiring states to provide the protections of equality and fundamental fairness to aliens as well as to citizens. Under our Constitution, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . shall be deprived of life, liberty, or property without due process of law." Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1094 (1866). Constitutional text and history mandate that the Sixth Amendment right to counsel in criminal proceedings shall not be diminished when a non-citizen defendant stands accused in our criminal justice system. *Padilla* simply recognized this constitutional command and applied *Strickland* when it held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." 130 S. Ct. at 1482.

The decision below is not only incorrect and in conflict with other courts' rulings—it also raises a question of indisputably exceptional importance both to the proper, fair functioning of our justice system and to residents like Petitioner who face deportation as a result of a prior conviction. This Court has acknowledged that deportation is akin to banishment, a particularly harsh penalty, and, as the Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. If citizens were automatically banished as a result of certain criminal convictions, surely it would not be a "new

rule" if the Court were to apply the *Strickland* analysis of ineffective assistance and hold that the Constitution requires that they not be misinformed as to this drastic consequence when deciding whether or not to plead guilty to a charged offense. It is of the utmost importance for the Court to clarify that non-citizens enjoy this protection as well. Professional norms, constitutional principles, and basic common sense and compassion demonstrate "how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 130 S. Ct. at 1486.

The importance of this issue is reflected in the facts of this case. Petitioner Roselva Chaidez was born in Mexico, but has made her home in the United States as a lawful permanent resident since the 1970s; she has three U.S.-citizen children. Pet. at 4. It is undisputed that had Ms. Chaidez known she would be deported for pleading guilty to charges arising out of her minor role in an insurance fraud scheme, she would not have done so. Unfortunately, her lawyer failed to follow established professional standards and advise Ms. Chaidez of the immigration consequences of potential criminal convictions. Pet. at 5. If *Padilla* applies to her case, Ms. Chaidez is entitled to relief. This case is an ideal vehicle for resolving the exceptionally important issue of the retroactivity of *Padilla*, which has divided the lower courts. *Amicus curiae* respectfully urges the Court to grant the Petition.

## ARGUMENT

**THE PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT, IN DIRECT CONFLICT WITH OTHER COURTS, INCORRECTLY DECIDED AN ISSUE OF EXCEPTIONAL IMPORTANCE.**

**A. The Court Should Grant Review To Clarify That *Padilla* Should Be Retroactively Applied Because It Was A Fact-Specific Application Of The Long-Standing Principle That Counsel Must Provide Reasonably Effective Assistance.**

As the Petition demonstrates, the lower courts are “openly and intractably divided” on the question of whether this Court’s ruling in *Padilla* applies retroactively to convictions that became final before its announcement. Pet. at 9, 10-16. Under the framework this Court announced in *Teague v. Lane*, 489 U.S. 288 (1989), a decision that simply applied an established rule to the facts of a particular case will apply retroactively; a decision imposing a “new obligation on the States or the Federal Government” will not. *Id.* at 301. The U.S. Court of Appeals for the Seventh Circuit erroneously held that *Padilla* was a “new rule” under *Teague*, deepening a conflict among the lower courts. See Pet. at 11-15.

*Padilla*’s recognition that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel”

and thus can serve as the basis for an ineffective assistance of counsel claim, 130 S. Ct. at 1482, does not impose a “new obligation on the States or Federal Government,” *Teague*, 489 U.S. 301. It is well-established that the right to assistance of counsel when considering a guilty plea is the right to “the *effective* assistance of competent counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added); *Strickland*, 466 U.S. at 686. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 116 (1998) (noting that “[t]he landmark English Treason Act of 1696, which first affirmed a right of counsel, explicitly spoke of ‘[c]ounsel learned in the law’”) (citing 7 and 8 Will. 3, ch. 3, §I). This Sixth Amendment guarantee to effective counsel applies just as strongly to non-citizen defendants as it does to citizens: the right to counsel refers simply and broadly to “the accused.” U.S. CONST. amend. VI.

The Fourteenth Amendment, which applied the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further established the Constitution’s protections for non-citizens by writing into our Constitution broad protections for liberty and equality, and guarantees of impartial justice. U.S. CONST. amend. XIV. Explaining the coverage of the equal protection and due process clauses of the Fourteenth Amendment—which apply not just to “citizens,” but rather to “any person”—Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction that drafted the Amendment, affirmed that these “last two clauses . . . disable a State from depriving not merely a



citizen of the United States but any person, whoever he may be, of life, liberty, or property without due process of law." Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2766 (1866). See also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that "all persons within the territory of the United States," including aliens, "are entitled to the protection" guaranteed by the Fifth and Sixth Amendments); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (applying to the States the fundamental Sixth Amendment right to assistance of counsel). In sum, both the States and the federal government were constitutionally required to ensure that non-citizen criminal defendants receive the same guarantee of effective assistance of counsel long before *Padilla*.

Because the Sixth Amendment does not identify "particular requirements of effective assistance," it "relies instead on the legal profession's maintenance of standards." *Strickland*, 466 U.S. at 688. Accordingly, when determining whether legal counsel "fell below an objective standard of reasonableness," *id.*, the Court assesses "reasonableness under prevailing professional norms," *id.* at 688.

As explained in *Padilla*, in light of changes to our nation's immigration laws, "[t]he 'drastic measure' of deportation or removal [] is now virtually inevitable for a vast number of noncitizens convicted of crimes." 130 S. Ct. at 1478 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). With these laws having "dramatically raised the stakes of a noncitizen's criminal



conviction[, t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important.” *Id.* at 1480. As the Court recognized nearly ten years before the *Padilla* decision, “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 *Bender’s Criminal Defense Techniques* §§60A.01, 60A.02[2] (1999)).

In the wake of these dramatic changes to immigration law, prevailing norms of professional practice required defense attorneys to advise their non-citizen clients regarding the risk of deportation. *Padilla*, 130 S. Ct. 1482 (citing professional standards, practice guides, and other sources). Accordingly, for at least fifteen years prior to the *Padilla* ruling, “professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Id.* at 1485.

As Justice Kennedy has explained, where the “beginning point” for a decision being analyzed for retroactivity is a rule of “general application” that is “designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring). The Sixth Amendment, which does not specify particular practices that amount to constitutionally sufficient assistance of counsel, and the *Strickland* test, which articulated a

general framework designed for fact-specific application, are precisely such “beginning points.” *Padilla*, moreover, is not the “infrequent case” that announces “a result so novel that it forges a new rule.” *Id.*

Given the constitutional command that non-citizens enjoy the robust protections of the Sixth Amendment’s right to effective assistance of counsel just as citizens do, and the professional norms that require effective counsel to include advice regarding deportation consequences of a guilty plea to non-citizen defendants—both of which predate the *Padilla* ruling—the application of *Strickland*’s ineffective assistance of counsel analysis to Mr. Padilla’s case cannot have articulated a “new rule.” *Padilla* imposes no “new obligation on the States or the Federal Government.” *Teague*, 489 U.S. at 301. The guarantee of effective assistance of counsel for citizens and non-citizens alike has bound the federal government since the ratification of the Sixth Amendment, and the States at least since the Amendment was incorporated by the Fourteenth Amendment. The *Strickland* test for reasonably effective assistance of counsel has always been keyed to “prevailing professional norms.” *Strickland*, 466 U.S. at 688. Accordingly, as the Petition argues, “[i]n *Padilla* this Court did not break any new ground; it simply held its ground.” Pet. at 24. The Seventh Circuit’s ruling to the contrary, which deepened a split among the courts, is incorrect.

## B. The Retroactivity Of *Padilla* Is Of Exceptional Importance.

The decision below is not only incorrect and in conflict with other courts' rulings—it also raises a question of indisputably exceptional importance. See Pet. at 16-18; Gov't Pet. for Reh'g En Banc 3-4, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011) (arguing that the question of *Padilla*'s retroactivity is “a question of exceptional importance”). The Court has generally recognized the pressing importance of the retroactivity of criminal procedure decisions. *E.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007); *Schriro v. Summerlin*, 542 U.S. 348 (2004). The need for a swift resolution to the question of *Padilla*'s retroactivity is similarly compelling.

Deportation is a “particularly severe penalty.” *Padilla*, 130 S. Ct. at 1481; *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893). This Court has recognized that deportation can be the equivalent of “banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), which, throughout history, has been recognized as a harsh and drastic consequence. See *Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was “the highest punishment next to death”) (quoting *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 386 (1667)). See also *Calder v. Bull*, 3 Dall. 386, 389 (1798) (citing the banishments of Lord Clarendon in 1667 and Bishop Francis

Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) (“[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment . . . . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice.”) (citations and quotation marks omitted). Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Act that “[i]f the banishment of an alien . . . be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the names can be applied.” James Madison, Report on the Virginia Resolutions of 1799, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1836).

This Court has echoed Madison’s sentiments, explaining that:

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

*Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

The severity of deportation and its importance to an alien's decision whether to plead guilty to a crime cannot be understated, as this Court has recognized. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). Indeed, "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence." *Bridges*, 326 U.S. at 164 (Murphy, J., concurring). For Ms. Chaidez, deportation would mean that she would be forced from the country she has called home for more than thirty years and separated from her U.S.-citizen children and grandchildren. Pet. at 17. The importance of these consequences is undisputed. Here, the district court found after an evidentiary hearing that "had Chaidez known of the immigration consequences, she would not have pled guilty." Pet. App. 36a.

The Petition raises a question of exceptional importance to the proper and fair functioning of our justice system, as well as to residents like Petitioner who face deportation as a result of a prior conviction. *Amicus* urges the Court to grant review.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLAS T. KENDALL  
ELIZABETH B. WYDRA\*  
CONSTITUTIONAL  
ACCOUNTABILITY CENTER  
1200 18<sup>th</sup> Street NW  
Suite 1002  
Washington, D.C. 20036  
(202) 296-6889  
elizabeth@theusconstitution.org  
*\*Counsel of Record*

*Counsel for Amicus Curiae*

January 30, 2012



**AMICUS  
CURIAE  
BRIEF**

JAN 30 2012

OFFICE OF THE CLERK

**In The  
Supreme Court of the United States**

ROSELVA CHAIDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Seventh Circuit**

**BRIEF OF AMICI CURIAE NATIONAL  
ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS, NATIONAL IMMIGRATION PROJECT  
OF THE NATIONAL LAWYERS GUILD,  
IMMIGRANT LEGAL RESOURCE CENTER AND  
IMMIGRANT DEFENSE PROJECT IN SUPPORT  
OF PETITION FOR A WRIT OF CERTIORARI**

JEFFREY T. GREEN  
NATIONAL ASSOCIATION  
OF CRIMINAL  
DEFENSE LAWYERS  
1501 K Street, N.W.  
Washington, D.C. 20005

ALISA WELLEK  
IMMIGRANT DEFENSE PROJECT  
3 West 29th Street, Suite 803  
New York, New York 10001

JEFFREY S. TRACHTMAN  
*Counsel of Record*  
DANI R. JAMES  
CRAIG L. SIEGEL  
KRAMER LEVIN NAFTALIS  
& FRANKEL LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100  
jtrachtman@kramerlevin.com  
*Counsel for Amici Curiae*

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The National Association of Criminal Defense Lawyers (“NACDL”), the National Immigration Project of the National Lawyers Guild (“NIP”), the Immigrant Legal Resource Center (“ILRC”), and the Immigrant Defense Project (“IDP”), respectfully submit this *amici curiae* brief in support of Petitioner.<sup>1</sup>

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### INTERESTS OF *AMICI CURIAE*

*Amici curiae* are nonprofit organizations with myriad members, constituents, clients, and client families who are facing the real-world consequences of detention and deportation resulting from plea-based convictions wrongfully procured in violation of a noncitizen’s Sixth Amendment right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). *Amici* are keenly interested in a nationally uniform resolution of the frequently recurring question whether there is a remedy for *Padilla*

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<sup>1</sup> Pursuant to Rules 37.2 and 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of this brief of *amici curiae*’s intention to file the brief. All parties have consented to the filing of the brief and the parties’ consent letters are being filed herewith. No counsel for a party authored the brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No persons or entities other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

violations pertaining to convictions that were final prior to March 31, 2010, the date *Padilla* was announced.

NACDL is a nonprofit association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL has more than 10,000 affiliate members who include private criminal defense attorneys, public defenders, and law professors. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

NIP is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. NIP has provided legal training to the bar and bench on the immigration consequences of criminal conduct since 1970, and has authored the treatise *Immigration Law and Crimes*, which was first published in 1984.

ILRC is a nonprofit national resource center that provides technical assistance in advocacy to low-income immigrants and their advocates. ILRC is known nationally as a leading authority on issues at the intersection of immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (formerly *California Criminal Law*

*and Immigration*), which was first published in 1990. Since its founding in 1979, ILRC has provided daily assistance to criminal defense and immigration counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

IDP is a nonprofit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused or convicted of crimes. A leading national expert on issues that arise from the interplay of immigration and criminal law, IDP has provided defense and immigration lawyers, criminal and immigration court judges, and noncitizens with expert legal advice, training, and publications on such issues since 1997. IDP's publications include *Representing Immigrant Defendants in New York*, which was first published in 1998.

NIP, ILRC, and IDP collaborate in the Defending Immigrants Partnership, a national initiative to improve the quality of justice for immigrants accused or convicted of crimes. Defending Immigrants Partnership, <http://defendingimmigrants.org/> (all Internet materials as visited Jan. 27, 2012). The partnership provides materials, training, and technical assistance to criminal defense lawyers and other participants in the criminal justice system.

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## SUMMARY OF ARGUMENT

There exists an entrenched and deepening conflict among federal and state courts over whether there is a remedy for *Padilla* violations pertaining to convictions that were final prior to March 31, 2010, the date *Padilla* was announced. The lack of a remedy imposes intolerably harsh consequences on countless noncitizens facing detention and deportation as a result of wrongfully procured plea-based convictions. For these noncitizens and their families – which often include both citizen and noncitizen children – the grave misfortune of a pre-*Padilla* final conviction in a federal judicial circuit that does not recognize a remedy for such *Padilla* violations, is deeply unjust and damaging: It can separate long-time residents from their loved ones and communities; tear apart families; impair children's health and education; and cause severe economic hardship. Moreover, the conflict creates a regrettable disuniformity in the enforcement of federal immigration law. Because the question presented seeks to resolve this intractable conflict, it is a question of exceptional national importance that should be decided by the Court now.

Additionally, the Court should decide the question presented because the decision below is inconsistent with *Padilla* and wrong. *Padilla* reiterates the rule of *Strickland* that the proper measure of attorney performance is reasonableness under prevailing professional norms. However, in deciding whether *Padilla* constitutes an “old rule” that would provide Petitioner with a remedy under *Teague v. Lane*, 489

U.S. 288 (1989), the decision below overlooks the significance of longstanding norms that required defense counsel, like Petitioner's defense counsel, to advise noncitizen clients of the immigration consequences of a guilty plea. Instead, in incorrectly holding that *Padilla* is a "new rule" under *Teague*, the decision below relies on pre-*Padilla* judicial decisions that mistakenly fail to properly consider these norms in rejecting ineffective assistance of counsel claims by noncitizens. This conflicts with the core premise of *Padilla* and warrants this Court's review of the decision.

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## REASONS THE WRIT SHOULD BE GRANTED

### **I. The Question Presented Is Exceptionally Important Because the Deepening Conflict Over the Retroactivity of *Padilla* Imposes Severe Consequences on Countless Non-citizens and Causes Disuniformity in the Enforcement of Federal Immigration Law.**

Each year, tens of thousands of noncitizen criminal defendants plead guilty in federal and state courts and risk detention and deportation as a result. For example, the U.S. Department of Justice reports that between October 1, 2008 and September 30, 2009, approximately 97 percent (or 84,326 out of 86,975) of federal convictions resulted from guilty pleas, and approximately 45 percent (or 35,629 out of



79,073) of convicted federal offenders were noncitizens.<sup>2</sup> The U.S. Department of Homeland Security reports that in 2009, 395,165 individuals were removed from the United States, of which 131,840 had criminal violations.<sup>3</sup> While the Court rightfully presumes that most convictions of noncitizens do not result from incompetent legal advice, *Padilla*, 130 S. Ct. at 1485, for those that did the consequences can be devastating.

Detention and deportation impose severe consequences on individual deportees. For example, most noncitizens charged with an aggravated felony are long-time residents of the United States who, on average, have been in the country for 15 years.<sup>4</sup> Deportation can separate them indefinitely from loved ones, communities in which they have deep roots, and gainful employment. See J. Hagan, B. Castro & N. Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border*

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<sup>2</sup> M. Motivans, U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Justice Statistics, 2009: Table 10 (2011); *id.*, Federal Justice Statistics, 2009: Statistical Tables, Table 4.4.

<sup>3</sup> Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2010 Yearbook of Immigration Statistics: Table 38 (2010).

<sup>4</sup> Transactional Records Access Clearinghouse, *How Often is the Aggravated Felony Statute Used?* <http://trac.syr.edu/immigration/reports/158/>. Petitioner falls within this group; she has been a lawful permanent resident since 1977, and has U.S. citizen children and grandchildren. Pet. 4, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011).

*Perspectives*, 88 N.C. L. Rev. 1799, 1818-20 (2010) (hereinafter “Hagan, *The Effects of U.S. Deportation Policies*”). Furthermore, research indicates that after deportation, deportees suffer “multiple traumas as they attempt to reintegrate into a country, culture, and society that they may have left years before.” *Id.*, 88 N.C. L. Rev. at 1820.

In addition, the detention and deportation of an immigrant parent or spouse can inflict damaging emotional, psychological, and financial consequences on children and other family members remaining in the United States. See J. Baum, R. Jones & C. Barry, *In the Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation*, Int'l Human Rights Law Clinic, University of California, Berkeley, School of Law *et al.*, 4-5 (2010), available at [http://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf) (hereinafter “Baum, *In the Child's Best Interest?*”) (“By removing a lawful permanent resident parent of a U.S. citizen child, the government . . . creates immense secondary social and economic effects.”); Hagan, *The Effects of U.S. Deportation Policies*, 88 N.C. L. Rev. at 1820 (“The physical removal of parents can have long-lasting traumatic effects on children and spouses left behind in the United States.”). Many of the children who suffer these consequences are United States citizens.<sup>5</sup>

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<sup>5</sup> According to one report, between 1997 and 2007, the United States deported the legal permanent resident (“LPR”)

(Continued on following page)

For example, in one recent study examining “the consequences of parental arrest, detention, and deportation on 190 children in 85 families in six locations across the country,” researchers reported that immigrant parental separation “pose[d] serious risks to children’s immediate safety, economic security, well-being, and longer-term development.” A. Chaudry, R. Capps, J. Manuel Pedroza, R. Maria Castañeda, R. Santos & M. Scott, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, Urban Institute, viii (2010), [http://www.urban.org/UploadedPDF/412020\\_FacingOurFuture\\_final.pdf](http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf). “[A]bout two-thirds of [the] children [in the study] experienced changes in eating and sleeping habits”; “[m]ore than half of [the] children . . . cried more often and were more afraid, and more than a third were more anxious, withdrawn, clingy, angry, or aggressive.” *Id.* at ix. Moreover, most households in the study “lost a working parent” as a result of immigration enforcement

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parent of approximately 103,000 children, of which at least 85 percent (or 88,000) were United States citizens. Baum, *In the Child’s Best Interest?* 4-5. In addition, an estimated 217,000 “other immediate family members – including U.S. citizen husbands, wives, brothers, and sisters” – were affected by the deportation of an LPR from their household. *Id.* Another study, which focused on individuals deported to El Salvador, shows that 73 percent of the interviewed deportees were parents with a child under the age of 18 living in the United States, and 90 percent of those children were born in the United States. J. Hagan, K. Eschbach & N. Rodriguez, *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 Int’l Migration Rev. 77 (2008).

and, thus, “experienced steep declines in income and hardships such as housing instability and food insufficiency.” *Id.* at viii-ix.

*Amici* can attest, based on decades of experience representing and counseling immigrants, that because of these and other far-reaching effects of deportation, immigration consequences are a key consideration for most noncitizen defendants in deciding whether to give up their right to a trial and plead guilty in a criminal case. *See Padilla*, 130 S. Ct. at 1483 (“We too have previously recognized that preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”) (citations and internal quotation marks and brackets omitted). In many cases, the risk of deportation is the *most important consideration* – which is not surprising given that many noncitizen defendants have lived in the United States for many years and have longstanding ties to this country. This is particularly so in cases in which a conviction may be deemed an “aggravated felony” under the immigration laws, like a conviction for petit larceny or receipt of stolen property where the sentence, even if suspended, is for at least one year. 8 U.S.C. § 1101(a)(43)(G). The immigration consequences of such a conviction can be dire for a noncitizen, and can include mandatory detention and deportation notwithstanding favorable factors such as long-time

lawful residence, family ties, evidence of rehabilitation, and service to the community.<sup>6</sup>

*Amici* have observed that such long-time residents, particularly those with family ties and a history of community service that might enable them to obtain a waiver of deportation if not convicted of an aggravated felony, are likely to place a very high priority on avoiding the consequences of an aggravated felony conviction when properly advised about a plea. As the American Bar Association (“ABA”) appropriately concluded in promulgating professional standards for defense counsel, on which the Court relied in *Padilla*, 130 S. Ct. at 1482, “many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.” ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999).

For these reasons, the question presented is one of exceptional national importance. In addition, it is compelling and important because the decision of the majority below deepens the disagreement between the Third Circuit, the Massachusetts Supreme Judicial Court, and other federal and state courts that have held there is a remedy for *Padilla* violations pertaining to convictions that were final prior to March 31, 2010, see *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011); *Commonwealth v. Clarke*, 949

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<sup>6</sup> Transactional Records Access Clearinghouse, *Aggravated Felonies and Deportation* <http://trac.syr.edu/immigration/reports/155/>.



N.E.2d 892, 904 (Mass. 2011),<sup>7</sup> and the Tenth Circuit and other federal and state courts that have held there is not, see *United States v. Hong*, \_\_ F.3d \_\_, 2011 WL 3805763, at \*7 (10th Cir. Aug. 30, 2011).<sup>8</sup> This creates greater disuniformity and unfairness in the enforcement of the Nation's immigration laws. Cf. *Murrieta v. INS*, 762 F.2d 733, 735 (9th Cir. 1985) ("Immigration law is an area in which uniformity is of great importance."). Accordingly, the question presented should be decided by the Court now.

## **II. The Decision Below Is Appropriate for Review Because It Is Inconsistent With *Padilla* and Wrong.**

The divided decision below holds that *Padilla* does not provide Petitioner with a remedy for the violation of her right to effective assistance of counsel under the Sixth Amendment, on the ground that *Padilla* is a "new rule" under *Teague* that does not apply to convictions like Petitioner's that became final before *Padilla* was announced. Pet. App. 18a, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011). The decision reasons in part that *Padilla* is a "new rule" because of the existence of pre-*Padilla* judicial decisions that held "the Sixth Amendment did not require counsel to provide advice concerning any

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<sup>7</sup> See also Pet. 14-15 nn.6-8 (citing cases).

<sup>8</sup> See also *id.* at 12-13 nn.3-4 (citing cases).



collateral (as opposed to direct) consequences of a guilty plea.” *Id.*

This reasoning directly conflicts with the core premise of *Padilla*, which reiterates what *Strickland* held more than 25 years ago: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688 (internal quotation marks omitted)). Although the majority below does not dispute this well-established principle, Pet. App. 5a, it mistakenly downplays the significance of longstanding professional norms that required defense counsel, including Petitioner’s defense counsel, to advise noncitizen clients of the immigration consequences of a guilty plea. Instead, it relies too heavily on pre-*Padilla* judicial decisions that mistakenly fail to properly consider these norms in rejecting ineffective assistance of counsel claims by noncitizens. This reliance conflicts with *Padilla*’s core premise that it is prevailing professional norms, not prior judicial decisions, that determine whether a *Padilla* violation exists.<sup>9</sup>

In considering prevailing professional norms, the Court in *Padilla* found that “[f]or at least the past 15

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<sup>9</sup> Moreover, as the decision below tacitly admits, Pet. App. 12a, its holding is inconsistent with this Court’s statement in *Padilla* that “[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*”. 130 S. Ct. at 1481 (internal citation omitted).

years, [these] norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 130 S. Ct. at 1485; *see also id.*, 130 S. Ct. at 1483-84 (citing standards and guidelines). "[A]uthorities of every stripe – including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications – universally require defense attorneys to advise as to the risk of deportation consequences for non-citizens." *Id.*, 130 S. Ct. at 1482 (internal quotation marks and citation omitted). For example, ABA standards at least as early as 1999 required defense counsel to "determine and advise" a client about the immigration consequences of pleading guilty. ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999).<sup>10</sup> Similarly, in 1995, the National Legal Aid & Defender Association ("NLADA") published guidelines directing defense counsel to "make sure the client is fully aware of . . . other consequences of conviction such as deportation" during guilty plea negotiations. NLADA, Performance Guidelines for Criminal Defense Representation, § 6.2(a)(3) (1995).

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<sup>10</sup> ABA standards at least as early as 1982 required defense counsel to investigate, and advise clients about, collateral "considerations" of a guilty plea, and listed deportation as a consideration in the commentary. ABA Standards for Criminal Justice, Pleas of Guilty Standard 14-3.2, cmt. (2d ed. 1982).

Numerous practice aids have educated defense counsel during the past few decades about the importance of advising noncitizen clients of the immigration consequences of a guilty plea, and ways to effectively do so. A widely cited defense treatise in use in the 1980s notes that “[n]o intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction . . . [including] liability to deportation if the defendant is an alien.” 1 A. Amsterdam, *Trial Manual* 5 for the Defense of Criminal Cases § 204 (1988); see also M. Fullerton & N. Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425 (1986). Another leading treatise instructs that an “attorney who suspects that his client is an alien has a duty to inquire and to protect his client’s immigration status.” 3 *Criminal Defense Techniques* § 60A.01 (S. Daniels & E. Smolinsky Pall eds., 2002). In addition, defense counsel have long had access to detailed resource materials that explain the specific immigration consequences of certain criminal convictions, and that describe strategies for ameliorating such consequences during criminal proceedings. See, e.g., D. Kesselbrenner, M. Baldini-Potermine & L. Rosenberg, *Immigration Law and Crimes*, NIP (2010) (first published in 1984); K. Brady, N. Tooby, M. Mehr & A. Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws*, ILRC (10th ed. 2008) (first published in 1990); M. Vargas,

*Representing Immigrant Defendants in New York*, IDP (5th ed. 2011) (first published in 1998).

The applicability and availability of these standards, guidelines, and practice aids have been long recognized by the Court. See *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001) (stating “competent defense counsel, following the advice of numerous practice guides,” would have affirmatively advised client whether conviction would impact removability). They demonstrate that there should be a remedy for *Padilla* violations suffered in connection with plea-based convictions that became final prior to March 31, 2010, because *Padilla* straightforwardly applied *Strickland* to hold that courts must look to these professional norms to determine whether defense counsel’s advice falls below the constitutional minimum. See *Orocio*, 645 F.3d at 639; *Clarke*, 949 N.E.2d at 903-04. The decision below failed to do that. Accordingly, it is inconsistent with *Padilla*, it is wrong, and it should be reviewed by the Court.

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## CONCLUSION

For the reasons stated herein, and in the petition for a writ of certiorari, the petition should be granted.

JEFFREY T. GREEN  
NATIONAL ASSOCIATION  
OF CRIMINAL  
DEFENSE LAWYERS  
1501 K Street, N.W.  
Washington, D.C. 20005

ALISA WELLEK  
IMMIGRANT DEFENSE PROJECT  
3 West 29th Street, Suite 803  
New York, New York 10001

Respectfully submitted,

JEFFREY S. TRACHTMAN  
*Counsel of Record*  
DANI R. JAMES  
CRAIG L. SIEGEL  
KRAMER LEVIN NAFTALIS  
& FRANKEL LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100  
jtrachtman@kramerlevin.com  
*Counsel for Amici Curiae*

January 2012

# **PETITIONER'S BRIEF**



JUL 17 2012

OFFICE OF THE CLERK

IN THE

**Supreme Court of the United States**

ROSELVA CHAIDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On a Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

**BRIEF FOR PETITIONER**

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Claudia Valenzuela  
Chuck Roth  
Sarah Rose Weinman  
NATIONAL IMMIGRANT JUSTICE  
CENTER  
208 South LaSalle  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Avenue, NW  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. The question presented is whether the principle articulated in *Padilla* applies to persons whose convictions became final before its announcement.

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## **BRIEF FOR PETITIONER**

Petitioner Roselva Chaidez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 655 F.3d 684. Two opinions of the United States District Court for the Northern District of Illinois are relevant here. The first (Pet. App. 31a) is unpublished, but available on Westlaw at 2010 WL 3979664. The second (Pet. App. 39a) is published at 730 F. Supp. 2d 896.

### **JURISDICTION**

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A timely petition for rehearing was denied on November 30, 2011. Pet. App. 56a. This Court granted certiorari on April 30, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL PROVISION**

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

In the 1990s, dramatic changes to immigration law both made deportation almost automatic for anyone convicted of crimes classified as “aggravated felonies,” *see, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii), and substantially expanded the list of such offenses. In the wake of these changes, this Court and other authorities recognized that criminal defense lawyers had a professional obligation to advise clients of the immigration consequences of guilty pleas. *See INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001). In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court applied the framework established in *Strickland v. Washington*, 466 U.S. 668 (1984), to confirm that a criminal defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when her lawyer fails to take even the basic step of advising her that a guilty plea may trigger deportation. This case presents the question whether that principle applies to persons whose convictions were final before *Padilla* was announced.

1. Petitioner Roselva Chaidez was born in Mexico but has lived in the United States since the 1970s. She has been a lawful permanent resident since 1977 and resides in Chicago with her three U.S.-citizen children and two U.S.-citizen grandchildren. Pet. App. 31a.

Several years ago, Chaidez became involved in an insurance scheme. As the Government explained, she was “not aware of the specifics of the scheme,” but others persuaded her to falsely claim to have been a passenger in a car involved in a collision. Plea Hr’g Tr. 16, Dec. 3, 2003. Chaidez received \$1,200 for

her minor role. According to the Government, however, the insurance company paid a total of \$26,000 to settle the claims that Chaidez and others made.

In 2003, the Government charged Chaidez with two counts of mail fraud for two separate mailings related to collecting her settlement. These charges implicated the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, 110. Stat. 3009-546, which expressly classifies as an "aggravated felony" "an[y] offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." 8 U.S.C. § 1101(a)(43)(M)(i).

Chaidez's attorney knew that she was not a U.S. citizen, and "it would have been rational under the circumstances for Chaidez to insist on a trial." Pet. App. 37a. It also may well have been possible for the attorney to negotiate a plea to the charges in which the stipulated loss for which Chaidez was responsible was below the \$10,000 threshold for aggravated felonies or in which Chaidez pleaded guilty to different charges that would not have triggered mandatory removal. *Cf. St. Cyr*, 533 U.S. at 322-23 (describing the common practice of negotiating pleas to avoid deportation). But contrary to then-prevailing professional norms, Chaidez's attorney "did not provide advice about the immigration consequences of a guilty plea." Pet. App. 35a.

No one disputes that "had Chaidez known of the immigration consequences" of being convicted of fraud involving more than \$10,000, she would not have pleaded guilty to the Government's charges. *Id.* 36a. Indeed, Chaidez "would have done everything

possible to remain in the United States,” including accepting “harsher punishment” than she stood to receive by obtaining an “acceptance of responsibility” adjustment for pleading guilty to the Government’s precise charges. *Id.* 34a, 36a. Yet because her lawyer provided no such information, Chaidez entered a guilty plea to the Government’s charges “without the benefit of a[ny] plea agreement,” leaving it to the court to determine the amount of loss and appropriate restitution. *Id.* 36a. After a hearing, the district court sentenced her to four years’ probation and ordered restitution in the amount of \$22,500. Her conviction became final in 2004. *Id.* 2a.

Having completed her probation and most of her restitution payments, Chaidez applied in 2007 for United States citizenship. *Id.* 32a. Chaidez, who speaks limited English, received assistance from non-lawyers in filling out her application. *Id.* The application did not mention her criminal conviction, but Chaidez disclosed it when asked about the subject in her immigration interview. *Id.* Following the interview, authorities initiated deportation proceedings. *Id.*

2. Shortly thereafter, Chaidez filed a petition in the U.S. District Court for the Northern District of Illinois for a writ of coram nobis under 28 U.S.C. § 1651(a), which “provides a method for collaterally attacking a criminal conviction when a defendant is not in custody, and thus cannot proceed under 28 U.S.C. § 2255.” Pet. App. 3a. Seeking to vacate her fraud conviction, Chaidez contended that her defense counsel rendered ineffective assistance under *Strickland* by failing to advise her that her guilty plea would subject her to deportation. Under



*Strickland*, a lawyer renders ineffective assistance of counsel in connection with a guilty plea if (1) counsel's representation fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defendant, 466 U.S. at 688, 694, insofar as "there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty" to the charges at issue. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

While that petition was pending, this Court decided *Padilla*, making clear the merit of Chaidez's Sixth Amendment claim.

In order to determine whether Chaidez was entitled to the benefit of *Padilla*, the district court turned to the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). While this Court thus far has applied *Teague* only to state convictions, see *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008), the Seventh Circuit has held that it applies to federal convictions as well, *Van Daalwyk v. United States*, 21 F.3d 179, 180 (7th Cir. 1994).

Under *Teague*, a decision that merely applied an established rule to the facts of a particular case governs already final convictions. By contrast, a new rule of criminal procedure – that is, a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government" – will not be given retroactive effect on collateral review, save

under certain exceptions not relevant here. *Teague*, 489 U.S. at 301.<sup>1</sup>

In this case, the district court concluded that the holding in *Padilla* was merely an application of *Strickland* to a new set of facts. It thus applied *Padilla* retroactively to Chaidez's ineffective-assistance claims. Pet. App. 44a.

Following an evidentiary hearing on the facts, the district court found that both prongs of the *Strickland/Padilla* test were satisfied. Counsel's performance was deficient because counsel "did not warn Chaidez that her guilty plea could carry immigration consequences." *Id.* 36a. And that failure was prejudicial because, "had Chaidez known of the immigration consequences, she would not have pled guilty" to the Government's charges. *Id.* 36a. The court thus granted a writ of coram nobis, vacating Chaidez's conviction.

3. The Government appealed, challenging only the district court's holding that *Padilla* applies retroactively here. *Id.* 6a. The court of appeals acknowledged that the Third Circuit and the Massachusetts Supreme Judicial Court – like the district court in this case – had held that *Padilla* applies to convictions that became final before its pronouncement. *Id.* 6a, 14a (citing *United States v. Orocio*, 645 F.3d 630, 640-42 (3d Cir. 2011), and

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<sup>1</sup> Unless otherwise noted, citations to *Teague* in this brief are to the plurality opinion, which a majority of this Court subsequently formally adopted as the law. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990).

*Commonwealth v. Clarke*, 949 N.E.2d 892, 898 (Mass. 2011)). Nonetheless, a divided panel of the Seventh Circuit disagreed with these holdings and reversed.

The majority did not dispute that, long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements. Nor did the majority dispute that “the application of *Strickland* to unique facts generally will not produce a new rule.” Pet. App. 15a; *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (same observation). But the majority “believe[d] *Padilla* to be the rare exception,” Pet. App. 15a-16a, owing to the judicial disagreement prior to *Padilla* and in *Padilla* itself over whether the Sixth Amendment should apply to advice regarding so-called “collateral” consequences of guilty pleas. In particular, some lower courts had previously held that the Sixth Amendment did not cover failures to give advice concerning such consequences, and the concurrence and dissent in *Padilla* characterized certain aspects of the majority opinion as substantial extensions of existing precedent. *Id.* 8a-9a. Accordingly, the majority concluded that although the question was a “challenging” one, “the scales [tip] in favor of finding that *Padilla* announced a new rule.” *Id.* 18a.

Judge Williams dissented. She emphasized that *Teague’s* test is an objective one and asks only whether the holding broke new ground. That being so, she reasoned, the existence of conflicting authority prior to *Padilla* “cannot change” the decisive fact that “*the Supreme Court itself* ‘never applied a distinction between direct and collateral

consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*.” *Id.* 26a (emphasis added) (quoting *Padilla*, 130 S. Ct. at 1481). To the contrary, Judge Williams emphasized, this Court recognized years before *Padilla* (and years before the plea in this case) that, at least in the context of advice regarding deportation, “preserving the client’s right to remain in the United States may be *more important* to the client than any potential jail sentence.” Pet. App. 26a (emphasis added) (quoting *St. Cyr*, 533 U.S. at 323).

4. Chaidez requested rehearing en banc, arguing in part that even if the court of appeals were disinclined to revisit the panel’s holding that *Padilla* were a new rule, it should rehear the case to reconsider its prior holding in *Van Daalwyk* that *Teague* governs retroactivity with respect to challenges to federal – as opposed to state – convictions. Pet’n for Reh’g En Banc 10-14. In particular, Chaidez contended that *Teague*’s concern with federalism does not apply in this context, nor should its concern with finality prevent her from obtaining relief. The court of appeals, however, denied rehearing en banc. Pet. App. 56a.

5. This Court granted certiorari. *Chaidez v. United States*, 132 S. Ct. 2101 (2012).

### SUMMARY OF ARGUMENT

The holding of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that criminal defense attorneys render ineffective assistance of counsel when they fail to advise their clients that pleading guilty may subject them to deportation applies to persons, such as

petitioner, whose convictions became final before its pronouncement.

I. *Padilla* did not announce a “new rule” under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). As Justice Kennedy has explained, “[w]here the beginning point” for a new decision is a preexisting standard “designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule.” *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment). Such is precisely the case here. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that attorneys render ineffective assistance when the attorneys unreasonably fail to advise clients according to prevailing professional norms. This flexible standard “provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims,” *Williams v. Taylor*, 529 U.S. 362, 391 (2000) – and, indeed, this Court has repeatedly applied this standard to grant persons relief on collateral review in factual circumstances different than in *Strickland*.

*Padilla* did nothing more than follow this established pattern. “For at least [] 15 years” prior to *Padilla*’s announcement, “professional norms ha[d] generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Padilla*, 130 S. Ct. at 1485. Accordingly, a straightforward application of the *Strickland* standard dictated that the failure to give such advice constitutes ineffective assistance of counsel.

Contrary to the Seventh Circuit’s view, it makes no difference that the advice at issue in *Padilla*



involved immigration consequences of a criminal conviction instead of one of the kinds of more “direct” consequences involved in prior cases. As the *Padilla* Court emphasized, this Court had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.” 130 S. Ct. at 1481. Nor in *Padilla* would there have been any sound legal basis for doing so. *Strickland* imposes upon counsel a “dut[y] to consult with the defendant on *important decisions*,” 466 U.S. at 688 (emphasis added), and this Court had long since made clear that deciding whether to plead guilty to a deportable offense is unquestionably an important decision.

It is likewise immaterial that some Justices in *Padilla* and lower court judges in pre-*Padilla* cases were reluctant to apply *Strickland* to deportation advice. The test for whether a holding established a new rule is an objective one that does not depend on vote counting. And the reasoning advanced in the *Padilla* dissent and the pre-*Padilla* lower court opinions rejecting such claims was simply inconsistent with *Strickland* and this Court’s prior recognition of the centrality of deportation considerations to noncitizen criminal defendants.

II. Even if *Padilla* did announce a new rule, it would still apply to persons challenging federal convictions in initial post-conviction filings. *Teague*’s ban against applying new rules on collateral review is based on comity and finality. But no comity interests are at stake when a federal court reviews the legitimacy of a federal, as opposed to state, conviction. And no finality considerations need to be



accommodated by a separate nonretroactivity rule when – as is also the case here – the claim at issue is designed be brought on collateral, as opposed to direct, review and the substantive doctrine already accounts for that reality.

Applying *Teague* to ineffective-assistance claims such as petitioner's would not only lack any theoretical basis, but it would also generate profound administrative problems. This Court held a decade ago in *Massaro v. United States*, 538 U.S. 500 (2003), that ineffective-assistance claims challenging federal convictions should generally be brought on collateral instead of direct review because the former provides a better setting in which to litigate such claims. Since that decision, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims *without prejudice* to defendants' ability to present those claims collateral review.

Holding here that *Teague* applies to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system. Because direct review would be the only time defendants could be assured of having their claims assessed without respect to whether they were seeking new rules, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review. In other words, holding that *Teague* applies in this context would reintroduce all of the practical difficulties that this

Court sought to prevent in *Massaro* and leave federal courts no legitimate way of mitigating the resulting inefficiencies, increased burdens, and procedural unfairness. There is no good reason for going back down that abandoned road.

### ARGUMENT

Applying the well-settled framework established in *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that a lawyer renders ineffective assistance of counsel when he fails to tell his client that pleading guilty may subject the client to deportation. Because Chaidez's counsel failed to provide her such advice, Chaidez seeks a writ of coram nobis vacating her conviction. Coram nobis "affords the same general relief as a writ of habeas corpus" and is therefore governed by the same retroactivity principles. Pet. App. 3a.

Those principles compel relief here. Under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* is not a "new rule" and thus applies to convictions that became final before its pronouncement. And even if *Padilla* were a new rule, it would still apply to persons challenging federal – as opposed to state – convictions in first post-conviction filings.

I. ***Padilla* Did Not Announce A New Rule Of Constitutional Law.**

A. **A Decision That Applies A Rule Formulated In An Earlier Case To New Facts Does Not Announce A New Rule.**

1. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a dichotomy governing whether state prisoners seeking federal habeas relief are entitled to the benefit of decisions announced after their convictions became final. Under *Teague*, federal courts may not announce or apply “new rules” of criminal procedure on collateral review. “[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.” *Id.* at 301 (citations omitted). By contrast, courts in collateral proceedings may grant relief that is “dictated by precedent” at the time the conviction at issue became final. *Id.* A decision is “dictated by precedent” when it is “merely an application of the principle that governed” a prior Supreme Court case. *Id.* at 307 (citation omitted).

*Teague* itself provided an example of a decision that did not announce a new rule but rather was dictated by precedent: *Francis v. Franklin*, 471 U.S. 307 (1985). See *Teague*, 489 U.S. at 307. *Francis* involved an application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which this Court had held that jury instructions that “ha[ve] the effect of relieving the State of the burden of proof” regarding *mens rea* violate due process. *Id.* at 521. The instruction invalidated in *Sandstrom* had created a *mandatory* presumption concerning *mens rea*, while the instruction in *Francis* merely *allowed* the jury to

presume *mens rea*. Consequently, the *Francis* dissent argued that applying *Sandstrom* to the instruction in *Francis* would “needlessly extend our holding in [*Sandstrom*] to cases where the jury was not required to presume conclusively an element of a crime under state law,” 471 U.S. at 332 (Rehnquist, J., dissenting). But the *Francis* Court rejected such a limitation on the general principle announced in *Sandstrom*. This Court explained that the “distinction” between the instructions in the two cases “d[id] not suffice” to call for a qualification of “the rule of *Sandstrom* and the wellspring due process principle from which it was drawn.” *Id.* at 316, 326. In the parlance of *Teague*, *Francis* shows that rejecting an untenable distinction does not announce a new rule; it simply enforces an old one in a different context.

Numerous post-*Teague* decisions reinforce that a decision applying a general rule announced in an earlier Supreme Court decision does not create a new rule, even when that rule is applied in a different context. See, e.g., *Stringer v. Black*, 503 U.S. 222, 229 (1992) (holding that, even though there were “differences in the use of aggravating factors under the Mississippi capital sentencing system [at issue in *Clemons v. Mississippi*, 494 U.S. 738 (1990)] and their use in the Georgia system in *Godfrey [v. Georgia]*, 446 U.S. 420 (1980)],” *Clemons* did not announce a new rule because “those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner’s sentence became final.”). As Justice Kennedy has summarized, “[w]here the beginning point” for a new decision is an earlier, more general rule “designed for the specific purpose of evaluating a myriad of factual

contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Wright v. West*, 505 U.S. 277, 309 (1992) (opinion concurring in the judgment).

2. *Strickland v. Washington*, 466 U.S. 668 (1984), established precisely such a general rule designed for fact-specific application. Accordingly, as this Court has recognized, “the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims.” *Williams v. Taylor*, 529 U.S. 362, 391 (2000).

a. In *Strickland*, this Court fashioned a two-part standard for evaluating claims of ineffective assistance of counsel across the “variety of circumstances” in which such claims arise. 466 U.S. at 689. According to this “now-familiar test[, a] defendant claiming ineffective assistance of counsel must show (1) that counsel’s representation ‘fell below an objective standard of reasonableness,’ and (2) that counsel’s deficient performance prejudiced the defendant.” *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (quoting *Strickland*, 466 U.S. at 688). This two-part standard applies to all ineffective-assistance claims, including those that arise out of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

With regard to the performance prong – the only part of the *Strickland* rule at issue here – the *Strickland* Court declined to formulate “detailed guidelines for representation,” and instead adopted a flexible reasonableness standard. *Strickland*, 466 U.S. at 688-89. The Court explained that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 688. Under this standard, counsel has



a “dut[y] to consult with the defendant on *important decisions* and to keep the defendant informed of *important developments* in the course of the prosecution.” *Id.* (emphasis added).

b. In the three decades since *Strickland* was decided, this Court has applied its standard in a multitude of settings, but it has *never* held that applying *Strickland* in new circumstances announced a new rule.

i. For instance, in *Flores-Ortega*, a state prisoner sought habeas relief, claiming that his attorney’s failure to advise him of the right to appeal his conviction after pleading guilty constituted ineffective assistance of counsel. 528 U.S. at 474. The warden, echoing holdings from three courts of appeals, argued that “trial counsel ha[d] no Sixth Amendment duty to advise a defendant of his appeal rights following a guilty plea.” Petr. Br. 7; *see also Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (“The Constitution does not require lawyers to advise their clients of the right to appeal.”); *Morales v. United States*, 143 F.3d 94, 97 (2d Cir. 1998) (same); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (same). As a fallback, the warden suggested, in accordance with the district court’s ruling, that *Teague* barred relief, Petr. Br. 6 & 9 n.6, and an *amicus* amplified that argument, Br. of Criminal Justice Legal Found. 18-20.

This Court, however, simply applied *Strickland* to the lawyer’s omission, holding that counsel *is* deficient for failing to inform a defendant of his appeal rights following a guilty plea when a rational defendant would want to appeal or the defendant reasonably demonstrated to counsel that he was interested in appealing. *Flores-Oretga*, 528 U.S. at



480. Then, having noted the suggestion that *Teague* barred relief, *id.* at 475, this Court implicitly rejected it, remanding the case for an application of its refinement of *Strickland*, *id.* at 487. On remand, the Ninth Circuit employed that refinement and granted habeas relief. *Flores-Ortega v. Roe*, 39 F. App'x 604 (9th Cir. 2002).<sup>2</sup>

ii. In the related context of 28 U.S.C. § 2254(d) – part of the Antiterrorism and Effective Death Penalty Act (AEDPA) – this Court likewise has strongly indicated that applying *Strickland* to new circumstances does not create a new rule. Section 2254(d) bars habeas relief unless a state court “unreasonabl[y]” applied “clearly established” law. 28 U.S.C. § 2254(d)(1). Temporal differences aside, *see Greene v. Fisher*, 132 S. Ct. 38 (2011), that test is at least as demanding as *Teague*’s “dictated by precedent” test, which this Court has described as precluding relief unless any “reasonable jurist[]” would have perceived the merit of the claim, *Lambrrix v. Singletary*, 520 U.S. 518, 528 (1997). *See also Schwab v. Crosby*, 451 F.3d 1308, 1323 (11th Cir. 2006) (“The content of the Section 2254(d) unreasonable application test is drawn in large part from the *Teague v. Lane* nonretroactivity doctrine and the decisions explicating it.”). As a result, if Section 2254(d) permits relief on the ground that this

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<sup>2</sup> The Ninth Circuit later explicitly held that *Flores-Ortega* did not announce a new rule. *Tanner v. McDaniel*, 493 F.3d 1135, 1142 (9th Cir. 2007). Every other federal appellate decision on the subject is in accord. *See, e.g., Lewis v. Johnson*, 359 F.3d 646, 655 (3d Cir. 2004); *Frazer v. South Carolina*, 430 F.3d 696, 704-05 (4th Cir. 2005).

Court is simply applying “clearly established law” to a new factual setting, then there is no basis to claim that this Court’s decision granting relief establishes a “new rule” under *Teague*.

This Court has repeatedly held that Section 2254(d) does not preclude relief that depends upon applying *Strickland* in new contexts. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court considered whether *Williams v. Taylor*, 529 U.S. 362 (2000), broke new ground in holding that the failure to investigate the defendant’s background in preparation for a capital sentencing hearing amounted to ineffective assistance of counsel. *Strickland* itself did not involve a background investigation (rather, it involved the failure to present character and psychological evidence), so one could have argued that “[t]here was nothing in *Strickland* . . . to support *Williams*’s statement that trial counsel had an obligation to conduct” such an investigation. *Wiggins*, 539 U.S. at 543 (Scalia, J., dissenting) (quotation marks omitted). The *Wiggins* Court rejected this parsing of *Strickland*, explaining that the Court “made no new law in resolving *Williams*’s ineffectiveness claim.” *Id.* at 522 (majority opinion). Indeed, the Court had emphasized in *Williams* itself that applying *Strickland* to attorneys’ failure to perform tasks other than those at issue in *Strickland* itself “can hardly be said” to “break[] new ground or impose[] a new obligation on the States.” *Williams*, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301); see also *Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to examine the file regarding client’s prior conviction prior to capital sentencing hearing warranted habeas relief under *Strickland*).

Last Term, this Court yet again held that *Strickland* dictated habeas relief for another kind of deficient performance. In *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012), the defendant's attorney, acting on a misinterpretation of state law, advised the client to reject a plea deal. The defendant followed that mistaken advice and was convicted at trial, and received a harsher sentence than the original plea offer. *Id.* He then sought federal habeas relief, arguing that he had suffered ineffective assistance of counsel under *Strickland*. *Id.* The state argued – as did the dissent in this Court – that attorney “error that does not impact a trial’s reliability does not implicate the Sixth Amendment.” Petr. Br. 11, *Lafler v. Cooper*, No. 10-209; accord *Lafler*, 132 S. Ct. at 1392-93 (Scalia, J., dissenting). This Court held, however, that *Strickland* so plainly encompassed the prisoner’s claim that “[b]y failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court’s adjudication was contrary to clearly established federal law.” *Lafler*, 132 S. Ct. at 1390.

**B. This Court’s Decision In *Padilla* Was Simply Another Fact-Specific Application Of *Strickland*’s General Rule That Counsel Must Provide Reasonably Effective Assistance.**

*Padilla* is simply another instance of this Court applying *Strickland* in a new factual setting. Adhering to *Strickland*’s requirement that lawyers “consult with the defendant on important decisions,” *Strickland*, 466 U.S. at 688, this Court held in *Padilla* that criminal defense lawyers render ineffective

assistance if they neglect to advise their clients that pleading guilty might subject them to deportation.

1. The Seventh Circuit did not dispute that “prevailing professional norms” at the time Padilla (and Chaidez) pleaded guilty – the touchstone of reasonableness under *Strickland*, 466 U.S. at 688 – obligated criminal defense lawyers to advise clients of the deportation consequences of a plea. Nor could it have done so. “*For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.*” *Padilla*, 130 S. Ct. at 1485 (emphasis added); *see also INS v. St. Cyr*, 533 U.S. 289, 322, 323 n.50 (2001) (noting that “competent defense counsel” would “follow[] the advice of numerous practice guides” and ensure that clients were “aware of the immigration consequences of their convictions”). Accordingly, at the time Chaidez’s conviction became final, it was plainly unreasonable under *Strickland*, for an attorney to fail to advise her client that pleading guilty would subject the client to deportation.

2. The Seventh Circuit nonetheless held that *Padilla* “br[oke] new ground,” *Teague*, 489 U.S. at 301, because “th[is] Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client’s criminal prosecution” – that is, regarding so-called “collateral” consequences. Pet. App. 16a; *see also id.* 12a. That reasoning is flawed. Differences between a new case and prior ones do not generate a new rule when, at the time the defendant’s conviction became final, “those differences could not have been considered a basis for denying relief.” *Stringer*, 503 U.S. at 229; *see also*

*Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258 (2007) (differences between a new case and prior ones do not generate a new rule when “the fundamental principles established by our most relevant precedents” dictate relief). And here, the precedent existing at the time of the guilty plea in this case foreclosed the notion of categorically carving out a deportation-consequences exception to *Strickland*.

From its inception, the *Strickland* test has eschewed categorical rules, insisting instead that “[t]he proper measure of attorney performance remains simply reasonableness *under prevailing professional norms*.” *Strickland*, 466 U.S. at 688 (emphasis added); *see also Flores-Ortega*, 528 U.S. at 478 (rejecting “per se rule[s] as inconsistent with *Strickland*’s holding). Thus, in *Padilla*, this Court easily brushed aside the suggestion that advice regarding “collateral consequences [fell] outside the scope of representation required by the Sixth Amendment.” *Padilla*, 130 S. Ct. at 1481 (quoting opinion below). As this Court emphasized, it has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.” *Id.* There was no basis, therefore, for holding that advice concerning “collateral” consequences was “categorically removed from the ambit of the Sixth Amendment right to counsel.” *Id.* at 1482.

In other words, *Padilla* simply reaffirmed that when a court confronts a claim of ineffective assistance, there is no “antecedent” question, U.S. Br. at Cert. 16, concerning whether the advice that the lawyer failed to give falls within the scope of the Sixth Amendment. Whenever a client is a criminal



defendant, the Sixth Amendment applies. *Strickland*, 466 U.S. at 688. And whenever the Sixth Amendment applies, the lawyer must give reasonable advice according to “prevailing professional norms,” *id.*, regardless of whether those norms concern direct or collateral consequences of following a particular course of action.

The notion of creating a categorical distinction between direct and collateral consequences would have been especially unsupportable in the context of deportation advice. “[F]or nearly a century” leading up to *Padilla*, this Court had stressed that deportation is “a particularly severe ‘penalty,’” *Padilla*, 130 S. Ct. at 1481 (citation omitted) – “the equivalent of banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). Indeed, “preserving [a] client’s right to remain in the United States may be *more* important to the client than any potential jail sentence.” *St. Cyr*, 533 U.S. at 322 (quotation marks and citation omitted, and emphasis added). Consequently, this Court recognized years before *Padilla* that any “competent defense counsel” would ensure that clients were “aware of the immigration consequences of their convictions.” *Id.* at 322, 323 n.50. *Padilla* did nothing more than apply these “fundamental principles” in the context of an ineffective-assistance claim. *Abdul-Kabir*, 550 U.S. at 258.

3. Contrary to the Seventh Circuit’s reasoning, neither the “[l]ack of unanimity on the Court in deciding” *Padilla*, Pet. App. 8a, nor the state of the law in lower courts before that decision indicates that *Padilla* is a new rule.

a. The “array of views” that the various Justices on this Court expressed in *Padilla* does not signal



that the holding in that case was new. As an initial matter, “the mere existence of a dissent” or other separate opinion does not “suffice[] to show that the rule [announced in a decision] is new.” *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004). For example, even though *Francis* was a five-to-four decision in which the lead dissent argued that the majority “needlessly extend[ed]” the holding of a prior case, 471 U.S. at 332 (Rehnquist, J., dissenting), this Court explained in *Teague* itself that *Francis* did not establish a new rule. *Teague*, 489 U.S. at 307. Similarly, this Court held in *Rompilla* that Section 2254(d)’s unreasonable application rule did not preclude relief, even though a four-Justice dissent argued that the Sixth Amendment had not even been violated. *Compare* 545 U.S. at 377 (majority opinion), *with id.* at 396-97 (dissenting opinion). The test for whether a rule is new, then, does not amount to a tallying of dissents and concurrences; rather, it is an objective test that assesses the actual substance of the majority decision.

At any rate, the content of neither the dissent nor of the separate concurrence indicates that the majority’s holding was new. The dissent sought to impose a new limitation on *Strickland*’s professional norms doctrine, narrowing it to advice concerning the direct consequences of pleas. *See Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting). But this Court rejected that argument, emphasizing that it was the dissent – not the majority – that was seeking to make new law. Not only had this Court “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*,” but the Court found it especially

inappropriate to do so in this context, given the Court's prior recognition that deportation is a severe penalty. *Padilla*, 130 S. Ct. at 1481; *see also supra* at 21-22.

For its part, the concurrence agreed that “a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland*” when he does not “advise the defendant that a criminal conviction *may* have adverse immigration consequences.” *Id.* at 1487 (Alito, J., concurring) (emphasis added). The concurrence characterized the majority's holding as “new” insofar as it “would not just require defense counsel to warn the client of a general risk of removal; it would also require counsel in at least some cases, to specify what the removal consequences of a conviction would be.” *Id.* at 1488 (emphases removed). But as the majority explained, “when the deportation consequence [of a guilty plea] is truly clear . . . the duty to give correct advice is equally clear.” *Id.* at 1483. In any event, Chaidez would have prevailed even under the test advocated by the concurrence because her attorney gave her no advice at all: the attorney “did not warn Chaidez that her guilty plea could carry immigration consequences.” Pet. App. 36a.

b. Similarly, the state of the law in the lower federal courts at the time *Padilla* was decided does not transform *Padilla*'s holding into a new rule of criminal procedure.

As with dissents and other separate writings in this Court, the “mere existence of conflicting authority” in the lower courts prior to a decision from this Court “does not necessarily mean a rule is new.” *Williams v. Taylor*, 529 U.S. at 410 (quoting *Wright v. West*, 505 U.S. at 304); *see also supra* at 16-17.

(noting that this Court's holding in *Flores-Ortega* that an attorney's failure to give a particular kind of advice did not announce a new rule, even though three federal circuits had held that *Strickland* did not require that advice). Rather, the test for determining whether a holding was dictated by precedent remains an "objective" one. *Williams*, 529 U.S. at 410 (citation omitted).

In any event, many of the lower-court decisions that had rejected *Padilla*-type claims have little bearing on whether *Padilla* was dictated by precedent as of the time Chaidez's conviction became final because the cases predate this Court's decision in *St. Cyr*. See *United States v. Orocio*, 645 F.3d 630, 640 (3d Cir. 2011) (sorting these cases). In *St. Cyr*, this Court expressly recognized that relief from deportation is "one of the principal benefits sought by [non-citizen] defendants deciding whether to accept a plea offer or instead to proceed to trial." 533 U.S. at 323. Accordingly, citing numerous professional guidelines that had been in place for several years, this Court noted that it expected noncitizen defendants, by way of their attorneys' advice, to be "acutely aware of the immigration consequences of [potential] convictions." *Id.* at 322. The need for such assistance of counsel, this Court further noted, had only intensified after IIRIRA eliminated the possibility of discretionary relief from deportation. *Id.* at 325.

The circuit court cases decided after *St. Cyr* but before *Padilla* actually accepted that *Strickland* applied to deportation advice. Each circuit to confront the issue in this timeframe held that misadvising a client regarding the deportation consequences of a guilty plea constituted ineffective

assistance under *Strickland*. See *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); see also *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (recognizing prior to *St. Cyr* that “certain [deportation] considerations are so important that misinformation from counsel may render the guilty plea constitutionally uninformed”); *Santos-Sanchez v. United States*, 548 F.3d 327, 333-34 (5th Cir. 2008) (accepting these holdings but finding no ineffective assistance because the lawyer, among other things, “gave Santos-Sanchez the name of an immigration attorney that he could contact”).

To be sure, some courts of appeals also held that the failure to give any advice regarding potential deportation consequences did not constitute ineffective assistance. See *Jimenez v. United States*, 154 F. App’x 540, 541 (7th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1256 (10th Cir. 2004); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003). The Ninth Circuit, for example, reasoned that even though *Strickland* applied to advice regarding deportation consequences, giving bad advice was different than giving no advice. See *Kwan*, 407 F.3d at 1015.

But distinguishing between misadvice and no advice flatly contravened *Strickland*’s instruction that counsel’s “acts or omissions” can fall outside the “range of professionally competent assistance.” *Strickland*, 466 U.S. at 690 (emphasis added); see also *St. Cyr*, 533 U.S. at 322, 323 n.50 (noting that “competent counsel” would make their clients “aware of the immigration consequences of their convictions”) (emphasis added). That is, *Strickland* itself clearly imposed upon counsel an affirmative

“dut[y] to *consult* with the defendant on important decisions.” 466 U.S. at 688 (emphasis added). Lower courts, therefore, did not have to wait for *Padilla* to learn that when, as here, the Sixth Amendment applies, clients are entitled to more than their lawyers’ silence.

## II. Even If *Padilla* Were A New Rule, It Would Apply In The First Post-Conviction Proceeding Of A Person Challenging A Federal Conviction.

*Teague* did not present, and this Court did not resolve, the question whether its retroactivity regime applies to post-conviction filings challenging federal, as opposed to state, convictions. *See Teague*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) (noting that the Court “does not address whether the rule it announces today extends to claims brought by federal, as well as state, prisoners”). Years later, this Court expressly reserved the issue. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008). Here, for the first time since *Teague*, this Court faces the question whether its decision in a prior case should apply to a petition for collateral relief from a federal conviction. This Court should hold, at least with respect to claims of ineffective assistance of counsel that depend on evidence outside the trial record, that *Teague* does not apply to such filings.

### A. *Teague’s* Comity And Finality Concerns Do Not Apply In This Context.

*Teague’s* bar against the retroactive application of new constitutional rules of criminal procedure rests on two bases: comity and finality. *Teague*, 489 U.S. at 308. Neither of these interests justifies applying



*Teague* to a person seeking collateral relief from a federal conviction due to ineffective assistance of counsel. Comity considerations are absent when a federal court is reviewing a federal conviction, and *Strickland's* highly deferential framework already accommodates the finality interest at stake when a court adjudicates an ineffective-assistance challenge to a federal conviction on collateral review.

1. *Comity*. *Teague's* bar against applying new rules to cases on collateral review is motivated in part by "comity" considerations – that is, the reluctance federal courts should have to upset state convictions. *Teague*, 489 U.S. at 308; *see also Danforth*, 552 U.S. at 280 (*Teague* is intended to "minimiz[e] federal intrusion into state criminal proceedings" – that is, "to limit the authority of federal courts to overturn state convictions"); *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing "[t]he comity interest served by *Teague*"). Federal review of state convictions is highly "intrusive" because it "forces the States to marshal resources" to keep convicted inmates locked up, even when the state trial "conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.<sup>3</sup>

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<sup>3</sup> For further expressions of this comity interest, see *Stringer v. Black*, 503 U.S. 222, 235 (1992) (federalism is "one of the concerns underlying the nonretroactivity principle"); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) ("The 'new rule' principle . . . fosters comity between federal and state courts."); *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (Stevens, J., concurring in part and concurring in the judgment) ("*Teague*



This comity interest is not implicated when, as in this case, the challenged judgment was issued by a federal rather than a state court.

2. *Finality*. Nor do *Teague* concerns about preserving the finality of criminal judgments pertain here, where petitioner's claim could not have been raised on direct review of her federal conviction and the constitutional law under which she seeks relief already accounts for the fact that the claim must be pressed on collateral review.

a. In *Teague*, the petitioner "repeated" – as all state habeas petitioners must – a claim that he had already raised in state court. *Id.* at 293.<sup>4</sup> In other words, the petitioner was attempting to use collateral review to obtain a second bite at the judicial apple: he wanted a federal court to entertain a constitutional claim that a state court had rejected previously. This Court held that in that context, respect for the finality of state-court judgments allows federal courts to apply only "old rules" on collateral review. *Teague's* nonretroactivity principle thus relies on a

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established . . . that a federal habeas court operates within the bounds of comity and finality" if it follows the "dictated by precedent" standard); *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) ("Comity interests and respect for state autonomy" support *Teague*).

<sup>4</sup> Of course, state prisoners sometimes *try* to press claims for the first time in federal habeas proceedings. But when they do so, federal courts must either dismiss those claims for failure to exhaust the prisoner's state-court remedies or deny them as procedurally defaulted. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982) (exhaustion); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (procedural default).

critical assumption: namely, that habeas petitioners have already had full and fair opportunities to raise their constitutional claims. 489 U.S. at 308-09; *see also Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., dissenting) (restrictions on retroactivity presume that the defendant “had a fair opportunity to raise his arguments in the original criminal proceeding”).

This assumption does not apply to *Padilla*-type challenges to federal convictions. In *Massaro v. United States*, 538 U.S. 500, 508 (2003), this Court instructed that ineffective-assistance challenges to federal convictions must be raised for the first time on collateral review – at least when they depend on evidence outside of the trial record. *Padilla* claims fit that mold. Specifically, trial records generally do not include evidence as to whether defense attorneys advised their clients that pleading guilty would have deportation consequences. *See Padilla*, 130 S. Ct. 1473, 1483 (2010). Even in the rare instances in which a trial record does include such information, it does not provide the evidence necessary to show – as required by the prejudice prong of the *Strickland/Padilla* test – that if the defendant had received such advice, she would not have pleaded guilty. *See id.* Accordingly, *Padilla*-type claims must be litigated in what this Court has called “initial-review collateral proceedings.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). As such, there is no basis for applying *Teague* in this context.

Indeed, this Court has already recognized that another judicially created equitable doctrine governing the availability of habeas relief, the procedural default doctrine, should not apply in these circumstances. The procedural default doctrine

precludes a federal court from granting habeas relief when the defendant “fail[ed] to raise a claim on [direct] appeal.” *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Just like *Teague*, this doctrine is designed to “respect the law’s important interest in the finality of judgments,” *Massaro*, 538 U.S. at 504. Yet in *Massaro*, this Court held that the procedural default doctrine does not apply to ineffective assistance challenges to federal convictions that are raised for the first time on collateral review. *Id.* at 509. And last Term in *Martinez*, this Court reaffirmed that “the first designated proceeding for a [defendant] to raise a claim of ineffective assistance,” is, for purposes of the procedural default doctrine, the “equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.” *Martinez*, 132 S. Ct. at 1317.

The same reasoning applies here. Because *Padilla*-type claims must be raised for the first time on collateral review, such “initial-review collateral proceedings” are the “equivalent of a [defendant’s] direct appeal.” As such, there is no basis for applying *Teague* in this context.

b. To be sure, some interest in repose exists respecting any federal judgment “that has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal.” *United States v. Frady*, 456 U.S. 152, 164 (1982). But *Strickland*’s constitutional formula already fully protects that interest when someone raises an ineffective-assistance claim on collateral review.

Recognizing that ineffective-assistance claims are almost always brought on collateral review, and therefore almost always implicate finality interests of

the “strongest” order, 466 U.S. at 697, this Court has structured the *Strickland* test to protect legitimate finality interests. Thus, the Court has stressed that because final judgments carry a “strong presumption of reliability,” *id.* at 696, the inquiry into an attorney’s performance is “highly deferential,” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). In particular, that inquiry turns not on whether the attorney made errors (even “significant errors,” *Lockhart v. Fretwell*, 506 U.S. 364, 379 (1993) (Stevens, J., dissenting)), but rather on “the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

*Strickland*’s prejudice prong is also expressly designed to protect “the fundamental interest in the finality of” convictions and “guilty pleas.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In contrast to typical constitutional claims, in which the prosecution bears the burden of showing that any procedural impropriety was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967), ineffective-assistance claims require the defendant to show that he was prejudiced by his counsel’s deficient performance. *Strickland*, 466 U.S. at 694.<sup>5</sup> That prejudice requirement is “highly demanding,” *Kimmelman*, 477 U.S. at 382: the

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<sup>5</sup> The only other frequently litigated constitutional claim that requires a demonstration of prejudice is a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed exculpatory evidence. See, e.g., *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). Such claims are also typically brought for the first time on collateral review.

defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Accordingly, as this Court noted in *Strickland*, the “principles governing ineffectiveness claims should apply in federal collateral proceedings” just as they would “on direct appeal.” *Id.* at 697.

The Court’s treatment of the ineffective-assistance claim in *Padilla* itself illustrates this reality. *Padilla* arose on state collateral review, and this Court expressly assumed that other similar claims would arise in “habeas proceeding[s]” or otherwise in “collateral challenges.” 130 S. Ct. at 1485-86. This Court, therefore, was careful to “give[] serious consideration” to “the importance of protecting the finality of convictions obtained through guilty pleas.” *Id.* at 1484. Yet even though Kentucky has adopted the *Teague* doctrine, see *Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), and even though this Court has the authority to raise *Teague* sua sponte, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), this Court did not feel the need to consider whether *Teague* might bar relief. Instead, this Court simply asked whether *Padilla*’s ineffective-assistance claim “surmount[ed]” *Strickland*’s already “high bar.” *Padilla*, 130 S. Ct. at 1485. Finding that it did, there was no need for additional analysis.<sup>6</sup>

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<sup>6</sup> Similarly, in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), another case arising on state collateral review, this Court did not consider whether *Teague* affected the availability of relief, but simply applied *Strickland* directly to respondent’s ineffective-assistance claim. If the Government is correct that



**B. Applying *Teague* In This Context Would Cause Administrative Problems And Be Fundamentally Unfair.**

Not only is there no theoretical reason to apply *Teague* to ineffective-assistance claims challenging federal convictions, but doing so would trigger serious practical difficulties and threaten profound unfairness.

1. “Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time.” *Massaro*, 538 U.S. at 504 (quotation marks and citation omitted); *see also Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Accordingly, in *Massaro*, this Court refused to apply the procedural default doctrine to ineffective-assistance challenges to federal convictions because doing so “would have the opposite effect.” 538 U.S. at 504. Namely, “defendants would feel compelled to raise [ineffective-assistance claims] before there has been an opportunity fully to develop the factual predicate[s] for the claim[s],” and such claims “would be raised for the first time in a forum not best suited to assess those facts.” *Id.*

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*Teague* applies to ineffective assistance claims such as *Padilla*, then the only reasons this Court was able to adjudicate *Padilla* – and possibly *Frye* as well – are because the states in the cases each forfeited *Teague* objections and this Court declined to raise them *sua sponte*. That seems very unlikely – and would be a very strange set of preconditions upon which to advance Sixth Amendment law in future cases.



Since *Massaro*, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims “without prejudice to [defendants’] ability to present those claims properly in the future.” *United States v. Wilson*, 240 F. App’x 139, 145 (7th Cir. 2007) (quotation marks and citation omitted).<sup>7</sup> This system – just as this Court expected – has promoted the efficient disposition of direct appeals and has ensured that federal defendants are treated fairly because, as the Government itself said in *Massaro*, defendants raising ineffective-assistance claims for the first time on collateral review are able to obtain “the same relief” that they could have obtained had the claims been adjudicated on direct review, U.S. Br. 34, *Massaro v. United States*.

Applying *Teague* to ineffective-assistance claims brought in first federal post-conviction review

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<sup>7</sup> See also, e.g., *United States v. Huard*, 342 F. App’x 640, 643-44 (1st Cir. 2009); *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003); *United States v. King*, 388 F. App’x 194, 198 (3d Cir. 2010); *United States v. Brooks*, 444 F. App’x 629, 629 (4th Cir. 2011); *United States v. Fearce*, 455 F. App’x 528, 530 (5th Cir. 2011); *United States v. Allen*, 254 F. App’x 475, 478 (6th Cir. 2007); *United States v. Cameron*, 302 F. App’x 475, 476 (7th Cir. 2008); *United States v. Kottke*, 138 F. App’x 864, 866 (8th Cir. 2005); *United States v. Carney*, 65 F. App’x 255, 257 (10th Cir. 2003); *United States v. Bolden*, 343 F. App’x 574, 577 (11th Cir. 2009).

proceedings would upend this system, reintroducing all of the administrative difficulties that this Court sought to prevent in *Massaro*. Direct review would become the only setting in which a defendant could be assured of having a legal argument adjudicated on its merits without regard to whether the claim might be considered “new.” Under such a regime, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review.

Faced with an onslaught of ineffective-assistance claims on direct review and an inability to adjudicate them properly, federal courts would have three basic choices, each of them deeply flawed.

First, federal courts might try to adjudicate ineffective-assistance claims as part of direct review. But, as this Court explained in *Massaro*, such claims – at least when, as here, they depend on facts beyond the trial record – cannot be properly litigated on direct review because the trial record will not “disclose the facts necessary to decide either prong of the *Strickland* analysis.” 538 U.S. at 505. Without a fully developed factual record (like the kind that, as this case shows, can be developed on collateral review), even meritorious ineffective-assistance claims will fail. *Id.* at 506.

Furthermore, litigating ineffective-assistance claims on direct review would put appellate counsel “into an awkward position vis-à-vis trial counsel.” *Id.* When appellate counsel also served as trial counsel, he would be understandably reluctant – if not unable – to bring a claim about his own ineffectiveness. Even when different attorneys handled district court and appellate proceedings, tension would arise

between the two that would impede litigation of an ineffective-assistance claim and bleed over into other issues on appeal as well. As this Court has noted, “[a]ppellate counsel often need trial counsel’s assistance in becoming familiar with a lengthy record on a short deadline,” and such assistance may be less forthcoming if appellate counsel will also be using that information to assess “trial counsel’s own incompetence.” *Id.*

Second, appellate courts might – as they sometimes did before *Massaro* – stay appellate proceedings whenever defendants raise ineffective-assistance claims and remand the cases to the trial courts for evidentiary hearings to develop the records necessary to decide such claims. *See, e.g., United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). But, as the Government explained in *Massaro*, this practice is undesirable because “[a] routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA’s strict limitations on the filing of successive [post-conviction] motions.” U.S. Br. 30 n.14; *see also Wilson*, 240 F. App’x at 145 (“Since *Massaro*, we have not remanded any case [on direct review] for an evidentiary hearing of an attorney’s effectiveness.”). Far from protecting society’s interest in the finality of criminal judgments, forcing ineffective-assistance claims into direct review would actually impede it.

Third, federal courts could continue dismissing ineffective-assistance claims whenever they were brought on direct review, thereby forcing defendants to bring them subject to *Teague* on collateral review.

But under this scenario, defendants would suffer a fundamental injustice: they would *never* be able to obtain unfiltered review of ineffective-assistance claims that depend (as nearly all do) on introducing evidence outside the trial record. If defendants on direct review pressed such claims, courts of appeals would dismiss the claims with instructions to raise them on collateral review. And if defendants brought such claims on collateral review, and those claims required a federal court to create a “new rule” to grant relief, *Teague* would prevent the court from doing so. Just as Major Major had a policy of never seeing anyone in his office while he was in his office and would accept visitors into his office only when he was not there,<sup>8</sup> so applying *Teague* in this context would leave defendants without any appropriate time to raise ineffective-assistance claims that depend on creating a “new rule.” Such claims would always be either too early or too late.

Such a state of affairs would be not only unfair but it would contravene “the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that right is invaded.” 3 William Blackstone, *Commentaries on the Laws of England* \*23 (1768). It bears remembering that *Teague* is really a doctrine about “redressability.” *Danforth*, 552 U.S. at 271 n.5. The doctrine is not premised on the view that this Court’s decisions themselves create new constitutional rights that did not exist before. Instead, *Teague* provides that even when a conviction has been secured in

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<sup>8</sup> See Joseph Heller, *Catch-22*, p. 106 (1961).

violation of the Constitution, a federal court cannot remedy that violation if the error was not clear at the time the defendant's conviction became final. *Id.* at 271. This non-redressability principle is perfectly acceptable against the backdrop of a regime in which defendants have opportunities prior to collateral review to ask courts to announce and to apply new rules. It cannot be justified, however, when no prior opportunity exists.

Preserving the possibility of a remedy when a defendant has been denied effective assistance of counsel – even when affording relief requires the articulation of a new rule – is especially important because “it is through counsel that the accused secures his other rights.” *Kimmelman*, 477 U.S. at 377. In other words, “the fairness and regularity” of the criminal justice system depends upon ensuring that lawyers live up to their Sixth Amendment obligations, and upon this Court’s ability to refine those obligations in light of ever-evolving circumstances in the criminal justice system. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The *Teague* doctrine should not hamstring this Court’s ability to define and enforce those obligations.

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.



Respectfully submitted,

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Claudia Valenzuela  
Chuck Roth  
Sarah Rose Weinman  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle  
Suite 1818  
Chicago, IL 60604

Thomas C. Goldstein  
Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Avenue, NW  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

July 16, 2012



# **RESPONDENT'S BRIEF**

**In the Supreme Court of the United States**

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ROSELVA CHAIDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**BRIEF FOR THE UNITED STATES**

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DONALD B. VERRILLI, JR.  
*Solicitor General*  
*Counsel of Record*

LANNY A. BREUER  
*Assistant Attorney General*

JOSHUA S. JOHNSON  
*Attorney*

*Department of Justice*  
*Washington, D.C. 20530-0001*  
*SupremeCtBriefs@usdoj.gov*  
*(202) 514-2217*

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## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea.

The question presented is whether, under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule that does not apply retroactively to convictions that became final before *Padilla* was decided.



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# In the Supreme Court of the United States

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No. 11-820

ROSELVA CHAIDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-30a) is published at 655 F.3d 684. The memorandum opinion and order of the district court granting petitioner's petition for a writ of error coram nobis (Pet. App. 31a-38a) is unpublished but is available at 2010 WL 3979664. The district court's memorandum opinion and order (Pet. App. 39a-55a) concluding that petitioner could benefit from this Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is published at 730 F. Supp. 2d 896.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 23, 2011. Pet. App. 1a. A petition for rehearing was denied on November 30, 2011. *Id.* at 56a. The petition for a writ of certiorari was filed on December 23,

2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. She was sentenced to four years of probation and ordered to pay restitution in the amount of \$22,500. Pet. App. 31a. After petitioner had completed her term of probation, she filed a petition for a writ of error coram nobis seeking to overturn her mail-fraud convictions on the ground that her trial counsel had never informed her that removal was a potential consequence of her conviction. The district court granted petitioner's coram nobis petition and vacated her convictions. *Id.* at 31a-54a. The court of appeals reversed and remanded the case for further proceedings. *Id.* at 1a-30a.

1. Petitioner was born in Mexico in 1956 and came to the United States as an undocumented alien in the 1970s. Pet. App. 31a. She eventually became a permanent legal resident and now lives in Chicago. *Ibid.*

In 1998, petitioner participated in a scheme to submit fraudulent automobile insurance claims for non-existent personal injuries. Presentence Investigation Report (PSR) 1-2. On April 14, 1998, petitioner, her son, and two other individuals met with an undercover FBI agent who was posing as an attorney. 12/3/03 Plea Hr'g Tr. 16. At this meeting, petitioner and her son signed forms purporting to retain the attorney to pursue insurance claims for injuries that they claimed to have incurred in a car accident on the previous day. *Ibid.* Petitioner and her son later visited a medical clinic, where they signed

forms falsely attesting to injuries that did not exist and medical treatment that they did not receive. *Id.* at 16-17. Petitioner knew that these forms would be used to support her fraudulent insurance claim. *Id.* at 17. The insurance company eventually wrote a check for \$11,000 to petitioner and her attorney. *Ibid.* Of this amount, petitioner received \$1200 as compensation for her participation in the insurance fraud scheme. *Ibid.* In total, the insurance company paid \$26,000 to settle all claims associated with the alleged April 13 accident. *Ibid.*

2. On June 26, 2003, a federal grand jury indicted petitioner based on her participation in the insurance-fraud scheme. On December 3, 2003, petitioner pleaded guilty to two counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2a.

Petitioner was sentenced on April 1, 2004. Petitioner's Sentencing Guidelines range of 0-6 months of imprisonment reflected an offense-level increase for the loss associated with the portion of the insurance-fraud scheme in which she participated and a two-level reduction for acceptance of responsibility. PSR 4-5; see Sentencing Guidelines § 2B1.1(b)(1)(C) (2003). The district court sentenced petitioner to four years of probation. 4/1/04 Sentencing Hr'g Tr. 25. It also required petitioner to pay restitution in the amount of \$22,500—the total amount that the insurance company paid to petitioner and her son based on their fraudulent claims. *Id.* at 23, 27. Petitioner did not appeal, and her conviction became final. Pet. App. 2a.

3. Because the fraud to which petitioner pleaded guilty involved a loss of more than \$10,000 and thus constituted an "aggravated felony," her convictions made her removable from the United States. 8 U.S.C.

1101(a)(43)(M)(i), 1227(a)(2)(A)(iii); see 8 U.S.C. 1229b(a)(3) (providing that the Attorney General may not cancel the removal of a permanent resident convicted of an aggravated felony). In July 2007, petitioner submitted a naturalization application in which she indicated that she had never been convicted of a crime. Pet. App. 32a. Immigration officials detected petitioner's misstatement, and on March 26, 2009—after petitioner had completed her four-year term of probation—she was served with a notice to appear before an immigration judge for removal proceedings based on her aggravated felony convictions. *Ibid.*

In October 2009, petitioner filed a petition for a writ of error coram nobis in district court, seeking to overturn her convictions on the ground that her trial attorney never informed her that removal was a potential consequence of her guilty plea. Pet. App. 32a-33a. The court dismissed the petition—which was not served on the government—because it had been filed as a separate civil proceeding rather than as part of petitioner's original criminal case. *Id.* at 39a. In December 2009, the attorney who had represented petitioner in her criminal prosecution died. *Id.* at 34a. In January 2010, petitioner refiled her coram nobis petition in her criminal case. *Id.* at 39a.

On March 31, 2010, this Court issued its decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel”; that the ineffective-assistance standard set forth in “*Strickland* [v. *Washington*, 466 U.S. 668 (1984)] applies to Padilla’s claim”; and that under *Strickland*, “an attorney must advise her client regarding the risk of deportation.” *Id.* at 1482. Petitioner asserted



that she was entitled to relief under *Padilla*. In response, the government contended, among other things, that *Padilla* had announced a new procedural rule, and that under *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion), *Padilla*'s holding should not be given retroactive effect in collateral challenges to convictions that had already become final when *Padilla* was decided. Pet. App. 40a.

The district court held that petitioner was entitled to rely on *Padilla* because "[t]he holding in *Padilla* is an extension of the rule in *Strickland*" rather than a new rule within the meaning of *Teague*. Pet. App. 44a; *id.* at 41a-52a. The court then held an evidentiary hearing at which, the court noted, "[n]either side presented much evidence," in part because the government was unable to interview petitioner's deceased criminal defense attorney. *Id.* at 33a-34a. The court concluded that petitioner's attorney had performed deficiently by failing to warn petitioner that conviction could result in removal. The court also determined that petitioner suffered prejudice because if she had been properly advised, she could rationally have decided to go to trial and risk prison rather than entering a guilty plea that would make her removal from the country a near certainty. *Id.* at 31a-38a. Accordingly, the court granted petitioner's coram nobis petition and vacated petitioner's convictions.<sup>1</sup> *Id.* at 38a.

4. The court of appeals reversed and remanded, holding that *Padilla* announced a nonretroactive new rule under *Teague*. Pet. App. 1a-19a. A "new" rule, the

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<sup>1</sup> The district court also rejected the government's arguments that petitioner's claim should be barred by laches, Pet. App. 37a-38a, and that coram nobis relief was not available for petitioner's claim, *id.* at 52a. The government did not renew those arguments on appeal.

court explained, is one that was not “dictated” by existing precedent, such that the outcome was “susceptible to debate among reasonable minds.” *Id.* at 6a-7a (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990); *Teague*, 489 U.S. at 301). The court of appeals reasoned that in *Padilla* itself, four Members of the Court characterized the Court’s decision as a departure from the Court’s Sixth Amendment precedents, demonstrating that reasonable jurists could differ as to whether *Padilla*’s rule was controlled by existing precedent. *Id.* at 8a-9a; *Padilla*, 130 S. Ct. at 1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment); *id.* at 1495 (Scalia, J., joined by Thomas, J., dissenting); *O’Dell v. Netherland*, 521 U.S. 151, 159 (1997).

The court of appeals also observed that *Padilla* overturned the near-unanimous view of state and federal courts “that deportation is a collateral consequence of a criminal conviction and that the Sixth Amendment does not require advice regarding collateral consequences.” Pet. App. 11a. The court explained that this “distinction between direct and collateral consequences was not without foundation in Supreme Court precedent.” *Ibid.* It could be traced, the court stated, to the Supreme Court’s decisions holding that a guilty plea is “voluntary where the defendant is ‘fully aware of the direct consequences’” of conviction, *id.* at 13a (quoting *Brady v. United States*, 397 U.S. 742, 747 (1970)), and that “the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases,’” *ibid.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1984)).

The court of appeals also rejected petitioner’s argument that *Padilla* was simply an application of *Strickland*’s standard for ineffective assistance of counsel to a

new factual scenario. Although the court acknowledged that applications of *Strickland* “generally will not produce a new rule,” the court concluded that *Padilla* was “the rare exception” because the Court had never before held “that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client’s criminal prosecution.” Pet. App. 15a-16a.

Judge Williams dissented, arguing that *Padilla* did not announce a new rule because it merely applied the ineffective-assistance test established in *Strickland* to attorney advice about immigration consequences. Pet. App. 19a-30a. In her view, the pre-*Padilla* consensus among state and federal courts that attorneys had no duty to advise their clients about immigration consequences was unpersuasive in light of recent changes in immigration law that made removal an often-automatic consequence of conviction. *Id.* at 25a-26a. Judge Williams also observed that the *Padilla* Court had stated that its decision would not lead to a flood of litigation because prevailing professional norms already required advice on removal consequences; she would have inferred from that statement that the Court expected its holding to be applied retroactively. *Id.* at 19a-30a.

5. Because the panel’s decision conflicted with the Third Circuit’s decision in *United States v. Orocio*, 645 F.3d 630 (2011), the panel circulated it to all active Seventh Circuit judges prior to publication. A majority voted against rehearing the case en banc, with Judges Rovner, Wood, Williams, and Hamilton voting in favor of rehearing. Pet. App. 1a n.1. Petitioner’s later petition for rehearing en banc was also denied. *Id.* at 56a.

## DISCUSSION

Petitioner contends (Pet. 9-26) that this Court's review is warranted to resolve whether *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that defense attorneys may provide ineffective assistance of counsel under the Sixth Amendment by failing to advise non-citizen defendants about the immigration consequences of pleading guilty, applies retroactively to individuals whose convictions became final before the decision was issued. The court of appeals correctly held that *Padilla* announced a new rule and, therefore, is not retroactive to cases on collateral review. The United States agrees with petitioner, however, that this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals. Review by this Court is therefore warranted.

1. The court of appeals correctly concluded that *Padilla* announced a new rule that does not apply retroactively to final convictions. *Padilla*'s holding that the Sixth Amendment's guarantee of effective assistance of counsel extends to advice about a matter beyond the scope of the criminal case and requires attorneys to warn noncitizen defendants about the risk of removal arising from conviction was not "dictated" by precedent within the meaning of *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion). To the contrary, *Padilla* overturned the overwhelming consensus among federal and state courts, and, in the view of four Members of the Court, significantly extended the Court's Sixth Amendment precedents. Pet. App. 4a-18a.

a. *Padilla* concerned the question whether the Sixth Amendment's guarantee of effective assistance of counsel extends to advice about the potential removal consequences of conviction even though removal has tradition-

ally been understood as a “collateral consequence” of a criminal conviction—a consequence that may arise from a conviction but is not a component of the defendant’s punishment for the offense and will not be imposed by the presiding court. The Kentucky Supreme Court had concluded that “collateral consequences are outside the scope of the representation required by the Sixth Amendment” and that as a result, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” *Padilla*, 130 S. Ct. at 1481 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (*Commonwealth*)).

In reversing that decision, this Court acknowledged that the Kentucky Supreme Court was “far from alone” in holding that the Sixth Amendment did not extend to advice about collateral consequences. *Padilla*, 130 S. Ct. at 1481 & n.9 (citing decisions from the First, Fourth, Tenth, Eleventh, and D.C. Circuits, as well as several state cases). But because “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders,” *id.* at 1481, the Court concluded that the “collateral versus direct distinction” on which lower courts had relied was “ill-suited” to the context of removal consequences, *id.* at 1482. The Court therefore held that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel” and that the ineffective-assistance standard set forth in “*Strickland* [v. *Washington*, 466 U.S. 668 (1984),] applies to *Padilla*’s claim.” *Ibid.*

In so holding, the Court rejected the argument that “*Strickland* applies to *Padilla*’s claim only to the extent that he has alleged affirmative misadvice” because



“counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case.” *Padilla*, 130 S. Ct. at 1484 (quoting U.S. Amicus Br. 10, No. 08-651). The Court concluded that “although [such a rule] has support among the lower courts,” there “is no relevant difference between an act of commission and an act of omission” in view of the importance of removal consequences to alien defendants. *Ibid.* (citing cases) (citation omitted).

Having determined that counsel’s constitutional obligation to provide effective assistance extended to potential immigration consequences, the Court drew “support[]” from “prevailing professional norms” to conclude that failing to advise a noncitizen defendant about the risk of removal could be deficient performance under *Strickland*. *Padilla*, 130 S. Ct. at 1482. The Court explained, however, that the “scope and nature” of the advice required of competent counsel depends on the “clarity” of the immigration-law provisions at issue. *Id.* at 1483 & n.10.

b. Under the retroactivity framework set forth in *Teague*, 489 U.S. at 299-316, new constitutional rules of criminal procedure are generally inapplicable to convictions that became final before the rule was announced.<sup>2</sup>

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<sup>2</sup> As petitioner notes (Pet. 6 n.1), this Court has not squarely held the *Teague* framework, which was articulated in the context of federal habeas review of state convictions under 28 U.S.C. 2254, extends to collateral review of federal convictions. See *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008). In *Danforth*, however, the Court observed that the lower federal courts have consistently applied *Teague* to federal prisoners’ motions for post-conviction relief under 28 U.S.C. 2255, and it explained that “[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions.” 552 U.S. at 281 n.16. Petitioner does not challenge *Teague*’s applicability in this case, see Pet. 6 n.1, and this



That general bar on retroactivity recognizes that “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” *Id.* at 309. Although *Teague*’s rule is subject to two limited exceptions for substantive rules and “watershed” procedural rules, see *Saffle v. Parks*, 494 U.S. 484, 494-495 (1990), neither exception applies here. Pet. App. 6a; see Pet. 10. The question whether *Padilla*’s rule may serve as the basis for collateral challenges to convictions that had already become final when *Padilla* was decided therefore turns on whether the rule is “new” within the meaning of *Teague*.

A rule is “new” for *Teague* purposes unless it was so “dictated” by the precedent in effect when the defendant’s conviction became final that “no other interpretation was reasonable.” *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997); see *Beard v. Banks*, 542 U.S. 406, 413 (2004) (citation omitted); *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997). It is thus not sufficient that a rule “could be thought to [be] support[ed]” by prior precedent, *Beard*, 542 U.S. at 414, or even that it represents the “most reasonable” interpretation of prior precedent, *Lambrix*, 520 U.S. at 538. In determining whether a rule was “susceptible to debate among reasonable minds” in light of the Court’s precedent, *O’Dell*, 521 U.S. at 160 (citation omitted), relevant considerations include

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case would not be a suitable vehicle to consider the question. Petitioner did not raise the question of *Teague*’s applicability below, see Pet. C.A. Br. 5-10, and this Court does not ordinarily consider questions that have not been properly preserved. See *Glover v. United States*, 531 U.S. 198, 205 (2001) (The Court does not ordinarily decide “questions neither raised nor resolved below.”).

whether the decision announcing the rule at issue purported to rely on “controlling precedent,” *Lambrix*, 520 U.S. at 528; whether there was a “difference of opinion on the part of \* \* \* lower courts that had considered the question,” *Butler v. McKellar*, 494 U.S. 407, 415 (1990); and whether the Justices expressed an “array of views,” *O’Dell*, 521 U.S. at 159.

c. The court of appeals correctly held that *Padilla* announced a new rule that was “susceptible to debate among reasonable minds” rather than dictated by precedent. *O’Dell*, 521 U.S. at 160 (citation omitted). As the court of appeals explained, Pet. App. 16a, before considering the nature and scope of any duty to advise noncitizen defendants concerning immigration consequences, *Padilla* had to address an antecedent question: whether “the scope of representation required by the Sixth Amendment” extends to advice about the immigration consequences of pleading guilty, 130 S. Ct. at 1481 (quoting *Commonwealth*, 253 S.W.3d at 483), such that “*Strickland* applies to *Padilla*’s claim,” *id.* at 1482. In answering that question in the affirmative, the Court acknowledged that it was “recognizing [a] new ground[] for attacking the validity of guilty pleas.” *Id.* at 1485. Moreover, although the Court observed that its holding “follows” from *Hill v. Lockhart*, 474 U.S. 52 (1984), which generally held that defendants are entitled to effective assistance of counsel in considering whether to plead guilty, *id.* at 1485 n.12, the Court also acknowledged that *Hill* did “not control” the decision. See *Lambrix*, 520 U.S. at 529 (decision announced a new rule where it relied on supporting authority, rather than a precedent that “controls or dictates the result”) (internal quotation marks omitted).

Indeed, *Padilla* departed markedly from the “legal landscape” extant when petitioner’s conviction became final in April 2004. *Beard*, 542 U.S. at 413. Every federal court of appeals to decide the issue—nine in all—held that the Sixth Amendment did not impose any duty to advise noncitizen defendants of the immigration consequences of pleading guilty. See Pet. App. 10a; *Santos-Sanchez v. United States*, 548 F.3d 327 (5th Cir. 2008); *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir.), cert. denied, 534 U.S. 1034 (2004); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000); *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990); *Santos v. Kolb*, 880 F.2d 941 (7th Cir.), cert. denied, 493 U.S. 1059 (1989); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985).<sup>3</sup> These courts reasoned that the Sixth

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<sup>3</sup> Petitioner does not address the unanimity among the federal courts of appeals. Rather, she asserts (Pet. 23) that only three federal appellate decisions reaffirmed that the Sixth Amendment does not extend to advice about removal after Congress expanded the grounds for removal and curtailed the Attorney General’s authority to grant discretionary relief from removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. But see Pet. App. 11a-12a (citing five, not three, such decisions from the First, Fifth, Seventh, Ninth, and Tenth Circuits); see also *Creary v. Mukasey*, 271 Fed. Appx. 127, 128 (2d Cir. 2008). But AEDPA and IIRIRA did not vitiate the precedential force of the numerous decisions that rejected a duty of advice because those cases held categorically that removal consequences were outside the scope of counsel’s affirmative duty to give advice about the defendant’s criminal jeopardy. Petitioner points to no court that suggested that AEDPA and IIRIRA required previous decisions to be reaffirmed, reconsidered, or overruled. And in any

Amendment did not require advice about collateral consequences because such consequences are not imposed within the criminal proceeding and the Supreme Court had observed in *Brady v. United States*, 397 U.S. 742, 755 (1970), “that the accused must be ‘fully aware of the direct consequences’ of a guilty plea.”<sup>4</sup> *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); see also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 726 (2002). Similarly, numerous state appellate courts held that counsel had no affirmative duty to advise about potential removal, reasoning in parallel to the federal courts. See *id.* at 699; see also, e.g., *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005); *People v. Davidovich*, 618 N.W.2d 579, 582 (Mich. 2000); *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995); *People v. Huante*, 571 N.E.2d 736, 740-741 (Ill. 1991).<sup>5</sup>

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event, for purposes of the *Teague* analysis, the relevant question is not whether AEDPA and IIRIRA might have spurred some courts to re-examine their reasoning; rather, the question is whether doing so would have been *dictated* by Supreme Court precedent. Petitioner rightly does not so contend.

<sup>4</sup> A few courts of appeals had held that while counsel had no duty to give advice about immigration consequences, affirmative misadvice could constitute ineffective assistance because all criminal attorneys have a duty not to misrepresent the extent of their expertise—about any topic—and because misadvice undermines the fairness of the guilty plea process. See *Padilla*, 130 S. Ct. at 1492-1493 & n.3 (Alito, J., joined by Roberts, C.J., concurring in the judgment) (citing *United States v. Kwan*, 407 F.3d 1005, 1015-1017 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 188 (2d Cir.), cert. denied, 544 U.S. 1034 (2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-1541 (11th Cir. 1985)).

<sup>5</sup> A small minority of state courts reached a contrary holding. See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *State v. Paredes*, 101 P.3d 799 (N.M. 2004).

Because *Padilla* abrogated the near-universal position of the lower state and federal courts, it cannot be said that *Padilla*'s holding would have been "apparent to all reasonable jurists" at the time that petitioner's convictions became final. *Beard*, 542 U.S. at 413 (citation omitted); see *O'Dell*, 521 U.S. at 166 n.3; *Lambrix*, 520 U.S. at 538.

The novelty of the rule announced in *Padilla* is underscored by the "array of views" expressed by the Justices in that case. *O'Dell*, 521 U.S. at 159; see *Sawyer v. Smith*, 497 U.S. 227, 236-237 (1990); *Beard*, 542 U.S. at 415-416. Justice Scalia, joined by Justice Thomas, dissented in *Padilla* on the ground that the Sixth Amendment "guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]—not for sound advice about the collateral consequences of conviction." 130 S. Ct. at 1494 (Scalia, J., dissenting) (quoting U.S. Const. Amend. VI) (alterations in original). In the dissenting Justices' view, the Court's holding represented a break from the Court's precedents: "We have until today \* \* \* retained the Sixth Amendment's textual limitation to criminal prosecutions." *Id.* at 1495. Similarly, Justice Alito and the Chief Justice, concurring in the judgment, observed that the "Court ha[d] never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice" about collateral consequences of conviction.<sup>6</sup> *Id.* at 1488. The concurring

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<sup>6</sup> In the concurring Justices' view, while the Sixth Amendment does not require attorneys to advise on immigration consequences, affirmative misadvice could give rise to an ineffective-assistance claim because misadvice "distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." *Padilla*, 130 S. Ct. at 1493. Such a dual rule, they noted, "appears faithful to the scope and nature of the Sixth Amendment duty



Justices, like the dissenters, viewed the Court's decision as a "dramatic departure from precedent" and a "major upheaval in Sixth Amendment law." *Id.* at 1491-1492.

d. Petitioner contends (Pet. 21), that *Padilla* did not announce a new rule because the decision was "simply another fact-specific application of *Strickland*'s general legal principle that counsel must provide reasonably effective assistance." In support, petitioner argues that "long before *Padilla* was decided, prevailing professional norms required attorneys to advise clients regarding immigration consequences of plea agreements." Pet. 22.

Contrary to petitioner's argument, *Padilla* did not simply represent a fact-specific application of the *Strickland* principle in a setting that the Court had not previously considered. Before deciding how *Strickland* would apply to advice about immigration consequences—*i.e.*, whether it would be deficient performance to fail to give such advice—the Court first had to resolve an antecedent and more fundamental question: whether "‘collateral consequences are outside the scope of representation required by the Sixth Amendment,’ and, therefore, the ‘failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.’" *Padilla*, 130 S. Ct. at 1481 (quoting *Commonwealth*, 253 S.W.3d at 483). Only once the Court had concluded that the Sixth Amendment imposed an obligation of effective assistance with respect to a consequence that is beyond the scope of the criminal proceeding in this "unique[]"

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this Court has recognized in its past cases." *Id.* at 1492. It would also, "unlike the Court's approach, not require any upheaval in the law," as the general rule among the lower courts was that although nonadvice was not actionable, misadvice was. *Id.* at 1493.



context could it then determine how *Strickland*'s familiar standard would apply in this novel situation. *Id.* at 1482.

The presence of this antecedent question distinguishes *Padilla* from the ineffective-assistance decisions on which petitioner relies. Pet. 20-21 (citing *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). *Williams*, *Wiggins*, and *Rompilla* concerned counsel's "duty to make reasonable investigations" within the criminal case, which the Court had established in *Strickland*, 466 U.S. at 690-691; each decision simply refined the scope of that duty in the context of specific factual circumstances. *Williams*, 529 U.S. at 390; *Wiggins*, 539 U.S. at 521-522; *Rompilla*, 545 U.S. at 380-381. Similarly, in *Flores-Ortega*, 528 U.S. at 477-478, it was already established that the Sixth Amendment entitled a defendant to advice concerning whether to file a direct appeal and assistance in doing so; the decision merely clarified the standards for evaluating counsel's performance. The only question in those cases was *how Strickland* applied to a new factual situation clearly within its ambit—not *whether* the advice in question fell outside the Sixth Amendment's guarantee of assistance of counsel in a "criminal prosecution[]." U.S. Const. Amend. VI.

Petitioner's reliance on pre-*Padilla* professional standards requiring attorneys to advise their clients on the immigration consequences of conviction is thus misplaced. Pet. 3, 21-22. While this Court has treated "[p]revailing norms of practice as reflected in American Bar Association standards and the like" as helpful "guides" to determining what constitutes reasonably

effective performance under *Strickland*, 466 U.S. at 688, it has never suggested that such standards speak to, much less define, the scope of the right to counsel guaranteed by the Sixth Amendment. See *Padilla*, 130 S. Ct. at 1482 (consulting American Bar Association (ABA) standards in considering what constitutes reasonable performance only after determining that the Sixth Amendment applied to immigration advice). And even with respect to what constitutes reasonable representation in cases in which *Strickland* applies, professional standards are “only guides to what reasonableness means, not its definition.” *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (per curiam). Indeed, the commentary following one of the professional standards cited in *Padilla*, 130 S. Ct. at 1482, and by petitioner here, Pet. 3, specifically stated that its imposition of a duty to advise on collateral consequences went beyond any constitutional duty imposed by the courts. *ABA Standards for Criminal Justice, Pleas of Guilty* 14-3.2(f) cmt. at 126 & n.25 (3d ed. 1999).

Petitioner also seems to suggest (Pet. 10-11) that in holding that *Padilla* might be entitled to relief even though *Padilla*’s claim arose in a state court post-conviction proceeding, the Court must have implicitly concluded that it was not announcing a new rule under *Teague*. But *Teague* had no application in *Padilla* because that case was on review from a state collateral proceeding. 130 S. Ct. at 1478. In *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), this Court held that “the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is

deemed ‘nonretroactive’ under *Teague*.” Accordingly, no federal *Teague* issue was before the Court, and the Court’s resolution of *Padilla* did not implicate that doctrine.<sup>7</sup> In any event, the *Teague* defense is “not ‘jurisdictional,’” and the State may waive or forfeit it in individual cases. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); see *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994). When a State forfeits the *Teague* bar, the Court may therefore announce a new rule even though the case might otherwise have presented *Teague* issues. The State in *Padilla* did not raise *Teague* as a defense, Pet. App. 17a, and the Court’s ruling thus does not imply any conclusion about retroactivity.<sup>8</sup>

2. As petitioner argues (Pet. 11-16), the federal courts are divided on the question of whether *Padilla* announced a new rule under *Teague*. The Third Circuit

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<sup>7</sup> It is irrelevant whether Kentucky applies a *Teague*-like doctrine on state collateral review. See Pet. 11. If Kentucky does so, it is applying state, not federal law. See *Danforth*, 552 U.S. at 289; see *id.* at 281-282.

<sup>8</sup> In *Lafler v. Cooper*, No. 10-209 (Mar. 21, 2012), and *Missouri v. Frye*, No. 10-444 (Mar. 21, 2012), this Court recognized ineffectiveness claims concerning negotiation and consideration of plea offers and remanded for application of its standards. *Lafler*, slip op. 15-16; *Frye*, slip op. 13-15. Neither case addressed *Teague* issues. *Frye* was a state case and therefore implicated no issues under *Teague*. See *Danforth*, *supra*. *Lafler* arose on federal habeas corpus review but the State did not raise *Teague* as a barrier to relief. See 10-209 Pet. i. The State did raise AEDPA’s requirement that a state court decision must be contrary to or an unreasonable application of clearly established federal law before relief may be granted, 28 U.S.C. 2254(d)(1), but this Court rejected that argument because the state court had failed to apply *Strickland* at all to assess the defendant’s ineffective assistance claim. *Lafler*, slip op. 15. That failure meant the federal habeas courts could “determine the principles necessary to grant relief.” *Ibid.* The Court said nothing about whether the “principles” it “determine[d]” were new under *Teague*.

has held that *Padilla* did not announce a new rule, see *United States v. Orocio*, 645 F.3d 630, 641 (2011), while the Tenth Circuit has followed the Seventh Circuit in holding that *Padilla* announced a new rule that does not apply retroactively, *United States v. Chang Hong*, No. 10-6294, 2011 WL 3805763, at \*2-\*10 (10th Cir. Aug. 30, 2011). The question is also currently pending before other courts of appeals. See, e.g., *United States v. Morales*, No. 11-16656 (9th Cir.) (argument not yet scheduled); *Llanes v. United States*, No. 11-13338 (11th Cir.) (argument not yet scheduled); *United States v. Amer*, No. 11-60522 (5th Cir.) (argument scheduled for Apr. 4, 2012); *Mathur v. United States*, No. 11-6747 (4th Cir.) (argued Jan. 26, 2012); *Haddad v. United States*, No. 10-2079 (6th Cir.) (oral argument waived). In addition, although state courts are free to accord procedural rules greater retroactive effect than the *Teague* standard would mandate, see *Danforth*, 552 U.S. at 266, state courts that employ the *Teague* standard have also divided on the question whether *Padilla* announced a new rule. See, e.g., *State v. Gaitan*, Nos. 067613, 068039, 2012 WL 612311, at \*11-\*16 (N.J. Feb. 28, 2012) (new rule); *Commonwealth v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011) (not a new rule).

The question of *Padilla*'s application to convictions that became final before the decision was announced is significant. As the number of cases raising the *Padilla* retroactivity issue (Pet. 12-16) demonstrate, many non-citizens are now attempting to overturn their long-final convictions based on this Court's decision in *Padilla*. These collateral proceedings threaten society's interest in the finality of criminal convictions. See *Teague*, 489 U.S. at 309 ("[T]he principle of finality \* \* \* is essential to the operation of our criminal justice system.").

That interest is heightened when convictions are based on guilty pleas. See *Custis v. United States*, 511 U.S. 485, 497 (1954) (“When a guilty plea is at issue, the concern with finality \* \* \* has special force.”) (internal quotation marks and citation omitted). They also will have a significant impact on the federal government’s efforts to enforce this Nation’s immigration laws against those who have become removable as a result of pre-*Padilla* criminal convictions.

This case is a suitable vehicle for the Court to resolve the question of *Padilla*’s retroactivity. The question is squarely presented and determinative of petitioner’s right to relief. See Pet. 18-19; Pet. App. 3a. Accordingly, this Court’s review is warranted to resolve the division of authority among the lower courts.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

LANNY A. BREUER  
*Assistant Attorney General*

JOSHUA S. JOHNSON  
*Attorney*

MARCH 2012

# **RESPONDENT'S BRIEF**



**In the Supreme Court of the United States**

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ROSELVA CHAIDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

BRIEF FOR THE UNITED STATES

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DONALD B. VERRILLI, JR.

*Solicitor General*

*Counsel of Record*

LANNY A. BREUER

*Assistant Attorney General*

MICHAEL R. DREEBEN

*Deputy Solicitor General*

GINGER ANDERS

*Assistant to the Solicitor  
General*

JOEL M. GERSHOWITZ

*Attorney*

*Department of Justice*

*Washington, D.C. 20530-0001*

*SupremeCtBriefs@usdoj.gov*

*(202) 514-2217*

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## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea.

The question presented is whether, under the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule that does not apply retroactively to convictions that became final before *Padilla* was decided.



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# **In the Supreme Court of the United States**

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No. 11-820

ROSELVA CHAIDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 655 F.3d 684. The memorandum opinion and order of the district court granting petitioner's petition for a writ of coram nobis (Pet. App. 31a-38a) is unpublished but is available at 2010 WL 3979664. The district court's memorandum opinion and order (Pet. App. 39a-55a) concluding that petitioner could benefit from this Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), is reported at 730 F. Supp. 2d 896.

## **JURISDICTION**

The judgment of the court of appeals (Pet. App. 1a) was entered on August 23, 2011. A petition for rehearing was denied on November 30, 2011 (Pet. App. 56a). The petition for a writ of certiorari was filed on Decem-



ber 23, 2011, and granted on April 30, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. She was sentenced to four years of probation and ordered to pay restitution in the amount of \$22,500. Pet. App. 31a. After petitioner had completed her term of probation, she filed a petition for a writ of coram nobis seeking to overturn her mail-fraud conviction on the ground that her trial counsel had never informed her that removal was a potential consequence of her conviction.<sup>1</sup> The district court granted petitioner's coram nobis petition and vacated her conviction. *Id.* at 31a-54a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-30a.

1. Petitioner was born in Mexico in 1956 and entered the United States without authorization in the 1970s. Pet. App. 31a. She eventually became a lawful permanent resident and now lives in Chicago. *Ibid.*

In 1998, petitioner participated in a scheme to submit fraudulent automobile insurance claims for nonexistent personal injuries. Presentence Investigation Report (PSR) 1-2. On April 14, 1998, petitioner, her son, and two other individuals met with an undercover FBI agent who was posing as an attorney. 12/3/03 Plea Hr'g Tr. 16 (Tr.); PSR 5. At this meeting petitioner and her son signed forms purporting to retain the attorney to pursue

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<sup>1</sup> Over the years, Congress has altered the immigration laws' "nomenclature" from "deportation" to "removal." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 n.6 (2010). This brief uses those terms interchangeably.

insurance claims for injuries they claimed to have incurred in a car accident on the previous day. Tr. 16. Petitioner and her son later visited a medical clinic, where they signed forms falsely attesting to injuries that did not exist and medical treatment that they did not receive. Tr. 16-17. The insurance company later wrote a check for \$11,000 to petitioner and her attorney. Tr. 17. Of this amount, petitioner received \$1200 as compensation for her participation in the insurance fraud scheme. *Ibid.* In total, the insurance company paid \$26,000 to settle all claims associated with the alleged April 13 accident. *Ibid.*

2. In June 2003, a federal grand jury indicted petitioner for her participation in the insurance-fraud scheme. On December 3, 2003, petitioner pleaded guilty to two counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2a.

Petitioner was sentenced on April 1, 2004. Petitioner's Sentencing Guidelines range of 0-6 months of imprisonment reflected an offense level increase for the loss associated with the portion of the insurance-fraud scheme in which she participated and a two-level reduction for acceptance of responsibility. PSR 4-5, 11; see Sentencing Guidelines § 2B1.1(b)(1)(C)(2003). The district court sentenced petitioner to four years of probation. 4/1/04 Sentencing Hr'g Tr. 24-25. It also required petitioner to pay restitution in the amount of \$22,500. *Id.* at 23, 27. Petitioner did not appeal, and her convictions became final.

3. Because the fraud to which petitioner pleaded guilty involved a loss of more than \$10,000 and thus constituted an "aggravated felony" under the Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.*, her conviction made her removable from the United States.

8 U.S.C. 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii); see 8 U.S.C. 1229b(a)(3) (providing that the Attorney General may not cancel the removal of a permanent resident convicted of an aggravated felony). In July 2007, petitioner submitted a naturalization application in which she indicated that she had never been convicted of a crime. Pet. App. 32a. Immigration officials detected petitioner's misstatement, and on March 26, 2009—after petitioner had completed her four-year term of probation—she was served with a notice to appear for removal proceedings based on her aggravated felony conviction. *Ibid.*

In October 2009, more than five years after her conviction became final, petitioner filed a petition for a writ of coram nobis in district court, seeking to overturn her conviction on the ground that her trial attorney never informed her that removal was a potential consequence of her guilty plea. Pet. App. 32a-33a. The court dismissed the petition—which was not served on the government—because it had been filed as a separate civil proceeding rather than as part of petitioner's original criminal case. *Id.* at 39a. In December 2009, the attorney who represented petitioner in her criminal case died. *Id.* at 34a. In January 2010, petitioner refiled her coram nobis petition in her criminal case. *Id.* at 39a.

On March 31, 2010, this Court issued its decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel”; that the effective-assistance standard set forth in “*Strickland* [v. *Washington*, 466 U.S. 668 (1984)] applie[d] to Padilla’s claim”; and that, under *Strickland*, “counsel must advise her client regarding the risk of deportation.” *Id.* at 1482. Petitioner contended that she

was entitled to *coram nobis* relief from her conviction under *Padilla*. Pet. App. 40a. In response, the government contended, among other things, that *Padilla* had announced a new procedural rule, and that under *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion), *Padilla*'s holding should not apply retroactively to collateral challenges to convictions that had already become final when *Padilla* was decided.<sup>2</sup> Pet. App. 40a, 45a.

The district court held that petitioner was entitled to rely on *Padilla* because "[t]he holding in *Padilla* is an extension of the rule in *Strickland*" rather than a new rule within the meaning of *Teague*. Pet. App. 44a; *id.* at 52a. The court then held an evidentiary hearing at which, the court noted, "[n]either side presented much evidence," in part because the government was unable to interview petitioner's deceased criminal defense attorney. *Id.* at 33a-34a. The court concluded that petitioner's attorney had performed deficiently by failing to warn petitioner that conviction could result in removal. The court also determined that petitioner had suffered prejudice. *Id.* at 31a-38a. The court granted petitioner's *coram nobis* petition and vacated her conviction. *Id.* at 38a.

4. The court of appeals reversed and remanded, holding that *Padilla* announced a nonretroactive new rule under *Teague*. Pet. App. 1a-19a. A "new" rule, the court explained, is one that was not "dictated" by existing precedent, such that the outcome was "susceptible to debate among reasonable minds." *Id.* at 6a-7a (quoting

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<sup>2</sup> Although *Teague*'s rule is subject to two limited exceptions for substantive rules and "watershed" procedural rules, see *Saffle v. Parks*, 494 U.S. 484, 494-495 (1990), petitioner did not contend that either exception applies here. Pet. App. 6a; see Pet. 10.

*Butler v. McKellar*, 494 U.S. 407, 415 (1990); *Teague*, 489 U.S. at 301). The court of appeals reasoned that, in *Padilla* itself, four Members of the Court characterized the Court's decision as a departure from the Court's Sixth Amendment precedents, demonstrating that reasonable jurists could differ as to whether *Padilla*'s rule was dictated by existing precedent. *Id.* at 8a-9a; *Padilla*, 130 S. Ct. at 1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment); *id.* at 1495 (Scalia, J., joined by Thomas, J., dissenting). The court of appeals noted further that "[e]ven the majority [in *Padilla*] suggested that the rule it announced was not *dictated* by precedent, stating that while *Padilla*'s claim 'follow[ed] from' its decision applying *Strickland* to advice regarding guilty pleas in *Hill* \* \* \* , *Hill* 'does not control the question before us.'" Pet. App. 9a (quoting *Padilla*, 130 S. Ct. at 1485 n.12).

The court of appeals also observed that *Padilla* overturned the near-unanimous view of state and federal courts "that deportation is a collateral consequence of a criminal conviction and that the Sixth Amendment does not require advice regarding collateral consequences." Pet. App. 11a. The court explained that this "distinction between direct and collateral consequences was not without foundation in Supreme Court precedent." *Id.* at 13a.

The court of appeals rejected petitioner's argument that *Padilla* simply applied *Strickland*'s standard for ineffective assistance of counsel to a new factual scenario. Although the court acknowledged that applications of *Strickland* "generally will not produce a new rule," it concluded that *Padilla* was "the rare exception" because the Court had never before held "that the Sixth Amendment requires a criminal defense attorney to



provide advice about matters not directly related to their client's criminal prosecution." Pet. App. 15a-16a.

Judge Williams dissented, taking the view that *Padilla* did not announce a new rule because it merely applied the test for ineffective assistance of counsel established in *Strickland* to attorney advice about immigration consequences. Pet. App. 19a-30a.

### SUMMARY OF ARGUMENT

I. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that the Sixth Amendment imposes on defense attorneys in criminal cases a duty to advise noncitizen defendants about the potential removal consequences of pleading guilty. *Padilla* announced a new constitutional rule of criminal procedure that, under *Teague v. Lane*, 489 U.S. 288, 303-310 (1989) (plurality opinion), does not apply retroactively on collateral review of convictions that became final before *Padilla* was decided.

A rule is "new" for *Teague* purposes unless it was so "dictated" by the precedent in effect when the defendant's conviction became final that the unlawfulness of the defendant's conviction would not have been "susceptible to debate among reasonable minds." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (citation omitted). The rule must be so clearly compelled that a court considering the defendant's claim at the time his conviction became final "would have acted objectively unreasonably"—not merely erroneously—in declining to grant relief. *Id.* at 156.

Here, there is no need to speculate about how reasonable jurists would have adjudicated a claim that counsel was constitutionally obligated to provide advice about deportation. At the time of petitioner's conviction, all ten federal courts of appeals to consider the issue, as



well as 28 out of 30 state appellate courts and the District of Columbia Court of Appeals, had held that the Sixth Amendment imposed no duty to advise defendants about the removal consequences of conviction. Concluding that *Padilla* did not announce a new rule would require the Court to find that the overwhelming consensus among federal and state courts was not only erroneous, but unreasonable.

The Court's opinions in *Padilla* itself confirm that the decision announced a new rule. The majority did not purport to rely on any controlling authority, 130 S. Ct. at 1485 n.12, and it acknowledged that the Court had not previously considered whether the Sixth Amendment extended to advice about consequences not imposed within the criminal case, *id.* at 1481. And the four concurring and dissenting Justices viewed *Padilla*'s holding as a "major upheaval in Sixth Amendment law," *id.* at 1488, 1491 (Alito, J., concurring), that extended counsel's Sixth Amendment duties well beyond the bounds previously established in the Court's decisions, *id.* at 1495 (Scalia, J., dissenting).

An examination of the Court's pre-*Padilla* precedents explains why reasonable jurists could and did conclude that the Sixth Amendment did not impose a duty to advise noncitizen defendants about the removal consequences of conviction. The Court's decisions on counsel's Sixth Amendment duty in the guilty-plea context had held only that counsel was required to advise the defendant on relevant guilt/innocence and sentencing issues so that the defendant would have a meaningful understanding of a guilty plea's implications for, and the strategic considerations surrounding, the defendant's interests within the criminal case. And the Court had repeatedly described deportation as a collateral conse-

quence of conviction, never suggesting that immigration consequences should be considered “close[ly] connect[ed]” to a defendant’s criminal jeopardy for purposes of the Sixth Amendment. *Padilla*, 130 S. Ct. at 1482.

Petitioner’s primary argument against recognizing *Padilla* as a new rule is that *Padilla* simply applied the ineffective-assistance standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in a new factual setting. This Court has stated that “[w]here the beginning point” of the Court’s analysis is a rule of “general application” that is designed to apply to varying factual contexts, it is less likely that a decision applying that standard will announce a new rule. *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (internal quotation marks and citation omitted). But petitioner cannot avail herself of this principle because *Strickland* was not “the beginning point” of the Court’s analysis. Rather, the *Padilla* Court first had to address the antecedent and threshold question of whether the Sixth Amendment extended to advice about removal consequences in the first place. 130 S. Ct. at 1482.

II. Petitioner also asserts two broader arguments against *Teague*’s application, both of which are forfeited and in any event without merit.

Petitioner first argues that *Teague* is inapplicable to collateral review of federal convictions because the comity concerns that form part of *Teague*’s rationale are not present when the underlying conviction is federal. But *Teague* also protects the finality of convictions, and the government’s interest in finality justifies applying nonretroactivity principles to collateral challenges to federal convictions. *Teague*, moreover, adopted the retroactivity principles set forth by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 675-702 (1971), a

case involving a collateral attack on a federal conviction. Justice Harlan stated that new rules should not be applicable to collateral attacks on both state and federal convictions, and nothing suggests that *Teague* departed from that unitary approach.

Petitioner next argues that *Teague* does not apply to claims of ineffective assistance of counsel because *Massaro v. United States*, 538 U.S. 500 (2003), permits defendants to assert an ineffective-assistance claim for the first time on collateral review under 28 U.S.C. 2255, and because, in her view, defendants lack an opportunity to seek new ineffective-assistance rules on direct review. But *Massaro* does not prevent defendants from seeking to establish new rules on direct review. In any event, petitioner's argument overlooks *Teague*'s rejection of the Court's prior retroactivity framework, which required a case-by-case analysis of the nature of the rule at issue. Taken to its logical endpoint, petitioner's argument would apply equally to other types of claims and reduce *Teague* to a cumbersome case-specific inquiry into whether the defendant had a reasonable basis for failing to seek a new rule on direct review.

### ARGUMENT

#### I. THE RULE ANNOUNCED IN *PADILLA* v. *KENTUCKY* DOES NOT APPLY RETROACTIVELY TO CONVICTIONS THAT BECAME FINAL BEFORE *PADILLA* WAS DECIDED

Under *Teague* v. *Lane*, a new rule of criminal procedure, announced after a defendant's conviction became final, is generally not applicable on collateral review of that conviction. 489 U.S. 288, 303-310 (1989) (plurality opinion); *Penry* v. *Lynnaugh*, 492 U.S. 302 (1989). A rule is "new" for *Teague* purposes unless it was so "dictated" by the precedent in effect when the defendant's convic-

tion became final that “no other interpretation was reasonable.” *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). The rule must be so clearly compelled that a court considering the defendant’s claim at the time his conviction became final “would have acted objectively unreasonably”—not merely erroneously—in declining to grant relief. *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997).

Accordingly, a defendant cannot prevail merely by showing that a rule “could be thought to [be] support[ed]” by prior precedent, *Beard v. Banks*, 542 U.S. 406, 414 (2004), or even that it represents the “most reasonable” interpretation of prior precedent, *Lambrix*, 520 U.S. at 538. Nor is it sufficient that the Court, in adopting the rule, stated that its decision was “controlled” by prior precedent, for “[c]ourts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts.” *Butler v. McKellar*, 494 U.S. 407, 415 (1990); see also *O’Dell*, 521 U.S. at 161 n.2; *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

Rather, a rule is not “new” under *Teague* only if, given the “legal landscape” when the defendant’s conviction became final, “all reasonable jurists” would have concluded that the defendant’s conviction was flawed by constitutional error. *Lambrix*, 520 U.S. at 527-528. In this case, there is no need to speculate about how “reasonable jurists” would have interpreted *Strickland v. Washington*, 466 U.S. 668 (1984), as applied to advice about deportation: all ten federal courts of appeals to address the issue, the District of Columbia Court of Appeals, and 28 out of 30 state appellate courts held before *Padilla* that no ineffective-assistance claim could be based on defense counsel’s failure to advise an alien de-



fendant about the risk of deportation. It is highly unlikely that all of those courts were not just wrong, but unreasonably so. The opinions in *Padilla* itself confirm that the Court's rule was new. The majority did not purport to find any prior decision controlling, see 130 S. Ct. at 1485 n.12, and it acknowledged the need for the Court to be "especially careful about recognizing *new* grounds for attacking the validity of guilty pleas," *id.* at 1485 (emphasis added). And the four concurring and dissenting Justices regarded the decision as a "dramatic departure from precedent" that marked a "major upheaval in Sixth Amendment law," *id.* at 1488, 1491 (Alito, J., concurring in the judgment), and a "significant further extension" beyond both the Court's prior decisions and the Sixth Amendment's "textual limitation to criminal prosecutions," *id.* at 1495 (Scalia, J., dissenting). An examination of the Court's pre-*Padilla* precedents explains why a reasonable jurist could have reached the conclusion that the Court's holding was not compelled by any precedent and why *Padilla* was not simply a fact-specific application of *Strickland*'s general rule.

**A. The Overwhelming Majority Of Federal And State Appellate Courts Concluded That Counsel Had No Obligation To Provide Advice About Removal Consequences**

In this case, "there is no need to guess" about whether "reasonable jurists could have differed" on whether the *Padilla* ruling was compelled by prior precedent. *Beard*, 542 U.S. at 414, 415; *O'Dell*, 521 U.S. at 166 n.3; *Caspari v. Bohlen*, 510 U.S. 383, 393-394 (1994). The lower federal courts of appeals and state appellate courts that considered the issue were in near-unanimous agreement that the Sixth Amendment did not require attorneys to advise defendants about removal consequences.

1. Before *Padilla*, all ten of the federal courts of appeals to address the issue had held that defense counsel have no Sixth Amendment obligation to advise their clients of the immigration consequences of pleading guilty. See, e.g., *Santos-Sanchez v. United States*, 548 F.3d 327, 334-336 (5th Cir. 2008) (reaffirming *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993)), cert. granted, judgment vacated, 130 S. Ct. 2340 (2010); *Broomes v. Ashcroft*, 358 F.3d 1251, 1256 (10th Cir.), cert. denied, 543 U.S. 1034 (2004); *United States v. Fry*, 322 F.3d 1198, 1200-1201 (9th Cir. 2003); *United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *United States v. Del Rosario*, 902 F.2d 55, 58-59 (D.C. Cir.), cert. denied, 498 U.S. 942 (1990); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989); *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989); *United States v. Campbell*, 778 F.2d 764, 768-769 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975) (per curiam); see also *Russo v. United States*, 173 F.3d 846, No. 97-2891, 1999 WL 164951, at \*2 (2d Cir. Mar. 22, 1999); see also *Ogunbase v. United States*, 924 F.2d 1059, No. 90-1781, 1991 WL 11619, at \*1 (6th Cir. Feb. 5, 1991).<sup>3</sup>

In general, these courts held that “[w]hile the Sixth Amendment assures an accused of effective assistance of counsel in ‘criminal prosecutions,’ this assurance does not extend to collateral aspects of the prosecution” such as removal. *George*, 869 F.2d at 337. These courts explained that removal is “not a part of or enmeshed in the criminal proceeding,” but is rather a “collateral consequence” of conviction—i.e., a consequence that may arise from a conviction but is not a component of the de-

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<sup>3</sup> The Third Circuit had declined to resolve the question. See *United States v. Nino*, 878 F.2d 101, 105 (1989).



fendant's punishment for the offense and will not be imposed by the presiding court. *Ibid.*; see also, e.g., *Fry*, 322 F.3d at 1200; *Gonzalez*, 202 F.3d at 25; *Banda*, 1 F.3d at 356. As a result, these courts held that counsel did not render deficient performance under the Sixth Amendment by failing to advise a defendant about removal consequences. *Ibid.*

The vast majority of state appellate courts to address the issue agreed that defense counsel had no Sixth Amendment obligation to advise their clients about the likelihood of removal. Appellate courts in 28 States and the District of Columbia—18 high courts, and 11 intermediate appellate courts—explicitly so held.<sup>4</sup> Only two

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<sup>4</sup> See *Rumpel v. State*, 847 So. 2d 399, 402-405 (Ala. Crim. App. 2002); *Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972), cert. denied, 410 U.S. 945 (1973); *State v. Rosas*, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); *Niver v. Commissioner of Corr.*, 919 A.2d 1073, 1075-1076 (Conn. App. Ct. 2007) (per curiam); *State v. Christie*, 655 A.2d 836, 841 (Del. Super. Ct.), aff'd, 655 A.2d 306, No. 94-252, 1994 WL 734468, at \*1 (Del. Dec. 29, 1994); *Major v. State*, 814 So. 2d 424, 426-431 (Fla. 2002); *Matos v. United States*, 631 A.2d 28, 31-32 (D.C. 1993) (alternative ground for denying relief); *People v. Huante*, 571 N.E.2d 736, 740-742 (Ill. 1991); *State v. Ramirez*, 636 N.W.2d 740, 743-746 (Iowa 2001); *State v. Muriithi*, 46 P.3d 1145, 1149-1152 (Kan. 2002); *Commonwealth v. Fuartado*, 170 S.W.3d 384, 385-386 (Ky. 2005); *State v. Montalban*, 810 So. 2d 1106, 1110 (La.), cert. denied, 537 U.S. 887 (2002); *Commonwealth v. Fraire*, 774 N.E.2d 677, 678-679 (Mass. App. Ct. 2002); *People v. Davidovich*, 618 N.W.2d 579, 582 (Mich. 2000) (per curiam); *Alanis v. State*, 583 N.W.2d 573, 579 (Minn. 1998); *State v. Clark*, 926 S.W.2d 22, 25 (Mo. Ct. App. 1996); *State v. Zarate*, 651 N.W.2d 215, 221-223 (Neb. 2002); *Barujas v. State*, 991 P.2d 474, 475-476 (Nev. 1999) (per curiam); *State v. Chung*, 510 A.2d 72, 76 (N.J. Super. Ct. App. Div. 1986); *People v. Ford*, 657 N.E.2d 265, 268-269 (N.Y. 1995); *State v. Dalman*, 520 N.W.2d 860, 863 (N.D. 1994); *Commonwealth v. Frometa*, 555 A.2d 92, 93-94 (Pa. 1989); *State v. Alejo*, 655 A.2d 692, 692-693 (R.I. 1995); *Nikolaev v. Weber*, 705 N.W.2d 72, 75-77 (S.D. 2005); *Bautista v. State*, 160

state courts had held that the Sixth Amendment requires advice about immigration consequences, and two more had refused to decide the issue.<sup>5</sup>

2. Petitioner downplays these decisions on the ground that the “mere existence” of contrary lower-court authority does not necessarily establish that a rule is new. Br. 24. But accepting petitioner’s argument that *Padilla* was dictated by prior precedent would not simply require this Court to discount the “mere existence” of a few decisions that failed to anticipate the result in *Padilla*. Rather, petitioner’s argument is premised on the assertion that *every* federal court of appeals—ten in all—and all but two of the state and District of Columbia appellate courts—29 in all—to address the issue were not only wrong but *unreasonable* in holding that the Sixth Amendment did not require advice about immigration consequences. See *O’Dell*, 521 U.S. at 156, 161 & n.3.

Petitioner also argues (Br. 25) that many of these decisions have “little bearing” on whether *Padilla* was dictated by precedent because they predated the Court’s 2001 decision in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50, in

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S.W.3d 917, 922 (Tenn. Crim. App. 2004); *Perez v. State*, 31 S.W.3d 365, 367-368 (Tex. App. 2000); *State v. Rojas-Martinez*, 125 P.3d 930, 934-935 (Utah 2005); *State v. Martinez-Lazo*, 999 P.2d 1275, 1279-1280 (Wash. Ct. App. 2000); *State v. Santos*, 401 N.W.2d 856, 858 (Wis. Ct. App. 1987).

<sup>5</sup> See *People v. Pozo*, 746 P.2d 523, 527-529 (Colo. 1987) (en banc); *State v. Paredes*, 101 P.3d 799, 805 (N.M. 2004); see also *In re Resendiz*, 19 P.3d 1171 (Cal. 2001); *State v. Arvanitis*, 522 N.E.2d 1089, 1091-1095 (Ohio Ct. App. 1986) (declining to decide whether Sixth Amendment imposes a duty to advise). Two courts held that their state constitutions imposed a duty to advise. See *Gonzalez v. State*, 134 P.3d 955, 958 (Or. 2006); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994).

which the Court observed that “competent defense counsel, following the advice of numerous practice guides, would” advise a defendant considering a guilty plea about the availability of relief from deportation. For the reasons discussed below, however, see pp. 28-29, *infra*, *St. Cyr*, an immigration decision, did not establish that counsel had a Sixth Amendment duty to advise defendants about the removal consequences of conviction. The lower courts shared that view of *St. Cyr*. No federal or state court decision appears to have relied on *St. Cyr* to abrogate its prior holding that the Sixth Amendment does not impose a duty to advise about removal. To the contrary, many of the decisions rejecting ineffective-assistance claims based on counsel’s failure to advise postdated *St. Cyr*. See, e.g., *Santos-Sanchez*, 548 F.3d at 335-336; *Broomes*, 358 F.3d at 1256; n.4, *supra*. And several of the courts that addressed *Padilla* claims after *St. Cyr* either expressly rejected the argument that *St. Cyr* altered Sixth Amendment principles or reaffirmed their prior precedent without discussing *St. Cyr*. See, e.g., *Fry*, 322 F.3d at 1200-1201 (“*St. Cyr* did not involve the effectiveness of counsel’s representation.”); *State v. Rojas-Martinez*, 125 P.3d 930, 937 (Utah 2005) (rejecting reliance on *St. Cyr*’s “aspirational language”); *State v. Muriithi*, 46 P.3d 1145, 1149-1150 (Kan. 2002) (rejecting argument based on *St. Cyr*); *Jimenez v. United States*, 154 Fed. Appx. 540, 541 (7th Cir. 2005); *People v. Bouzidi*, 773 N.E.2d 699, 704-707 (Ill. App. Ct. 2002); *Perales v. State*, No. A03-1074, 2004 WL 292073, at \*3-4 (Minn. Ct. App. Feb. 17, 2004); *Rubio v. State*, 194 P.3d 1224, 1229-1230 (Nev. 2008).

Petitioner also asserts (Br. 25-26) that the fact that three federal courts of appeals had held that affirmative misadvice about removal could be grounds for an inef-

fective-assistance claim demonstrates that these courts “accepted that *Strickland* applied to deportation advice.” See Br. 25; *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187-188 (2d Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1539-1541 (11th Cir. 1985). But these same courts had held, like the other circuit courts, that the Sixth Amendment did not impose a duty to advise about removal consequences. They distinguished affirmative misadvice on the ground that all criminal defense attorneys have a duty not to misrepresent the extent of their expertise about any topic. See *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 187-188; cf. *Downs-Morgan*, 765 F.2d at 1541 n.15 (misadvice is deficient when defendant faces imprisonment in his home country).<sup>6</sup> Both before and after *St. Cyr*, then, the federal courts of appeals were unanimous in the view that the Sixth Amendment imposed no obligation on counsel to advise defendants of the immigration consequences of conviction.

**B. The *Padilla* Opinions Confirm That *Padilla* Announced A New Rule Concerning The Extent Of Counsel’s Duties Under The Sixth Amendment**

The majority, concurring, and dissenting opinions in *Padilla* confirm that the Court did not view *Padilla*’s holding as dictated by prior decisions. The reasoning of those opinions makes clear that reasonable jurists could differ on the extent to which the *Padilla* rule followed

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<sup>6</sup> The Solicitor General in *Padilla* likewise distinguished between “affirmative misadvice,” to which *Strickland* was said to apply, and failure to advise at all about “matters that will not be decided in the criminal case,” to which *Strickland* was said not to apply. *Padilla*, 130 S. Ct. at 1484 (rejecting that distinction despite recognizing that “it has support among the lower courts”).



from precedent. See, e.g., *Lambrix*, 520 U.S. at 528; *Beard*, 542 U.S. at 414-415.

1. a. In evaluating whether *Padilla* announced a new rule, it is highly “significant” that the Court “itself did not purport to rely upon any controlling precedent.” *Lambrix*, 520 U.S. at 528.

*Padilla* concerned the question whether the Sixth Amendment’s guarantee of effective assistance of counsel extends to advice about the potential removal consequences of conviction even though removal has traditionally been understood as a “collateral consequence” of a criminal conviction. 130 S. Ct. at 1481. Before applying *Strickland*’s ineffective-assistance standard to *Padilla*’s claim, the Court had to establish two related premises: first, that the Sixth Amendment duty of effective assistance extends beyond matters related to resolving a defendant’s criminal jeopardy; and second, that removal from the country, while traditionally understood not to be part of a defendant’s criminal jeopardy, is sufficiently “close[ly] connect[ed] to the criminal process” to fall within the Sixth Amendment’s ambit. *Id.* at 1482.

While the Court rejected the Kentucky Supreme Court’s holding that “collateral consequences are outside the scope of representation required by the Sixth Amendment,” *Padilla* 130 S. Ct. at 1481, this Court did not suggest that the Kentucky court’s conclusion was foreclosed—or even addressed—by its precedents. Rather, the Court stated that “[w]e \* \* \* have never applied a distinction between direct and collateral consequences to define the scope” of the Sixth Amendment. *Ibid.* Petitioner reads that statement (Br. 21) to mean that the Court’s precedents foreclosed the proposition that the Sixth Amendment duty of advice did

not extend beyond matters necessary to resolve the criminal case. But the Court did not suggest it had ever rejected the direct/collateral distinction or cite any decisions doing so. And the Court immediately followed with the statement that “we need not consider” in *Padilla* “[w]hether that distinction is appropriate.” 130 S. Ct. at 1481. These assertions, taken together, reflect the Court’s acknowledgement that the Sixth Amendment’s extension to advice about consequences that are not imposed as part of the criminal case was an open question under its decisions. Contrary to petitioner’s argument, then, the Court did not “easily brush[] aside” (Br. 21) the Kentucky Supreme Court’s direct/collateral distinction as foreclosed by Sixth Amendment precedents—rather, the Court expressly acknowledged that it had never before addressed the question.

Instead of resolving that open question, the Court concluded that the “unique nature of deportation” made removal “difficult to classify as either a direct or a collateral consequence” and determined that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right.” *Padilla*, 130 S. Ct. at 1481-1482. Here too, the Court did not purport to rely on controlling precedent. The Court acknowledged that it had held that removal was not “a criminal sanction,” *id.* at 1481 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), but reasoned that “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders,” *ibid.* As a result, the Court concluded, the “collateral versus direct distinction” on which lower courts had relied was “ill-suited” to the context of removal consequences, *id.* at 1482. Although the Court



drew support for that conclusion from *St. Cyr* and other decisions recognizing that removal is a severe consequence, *id.* at 1481, the Court did not suggest that any decision had ever suggested—much less *established*—that removal’s “nearly automatic” character rendered it “close[ly] connect[ed]” to the criminal proceeding for Sixth Amendment purposes. *Id.* at 1482.

Other aspects of the *Padilla* opinion confirm that the Court viewed its decision as extending, rather than applying, existing precedents. The Court explicitly acknowledged that it was “recognizing [a] *new ground*[ ] for attacking the validity of guilty pleas.” 130 S. Ct. at 1485 (emphasis added). In addition, the Court explained that although its holding “follow[ed]” from *Hill v. Lockhart*, 474 U.S. 52 (1984), which held generally that the *Strickland* test applies to guilty-plea challenges based on ineffective assistance of counsel, *Hill* did “not control” the decision. 130 S. Ct. at 1485 n.12. Nor did the Court claim that any other decision controlled the outcome. Given that even a claim that a decision was “controlled” by prior opinions is not dispositive under *Teague*, see *Butler*, 494 U.S. at 415, the majority’s failure to cite any authority as controlling suggests that the decision announced a new rule.

b. Petitioner argues (Br. 33) that the fact that the Court did not apply *Teague* in *Padilla* itself indicates that *Padilla* did not announce a new rule. But *Teague* had no application in *Padilla* because *Padilla* was on review from a state collateral proceeding. See 130 S. Ct. at 1478. This Court has held that “the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a

remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.” *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008). Whether or not the Kentucky courts apply a *Teague*-like doctrine of their own on state collateral review is therefore a matter of *state*, not federal, law. See *id.* at 288-289, 281-282. No federal *Teague* issue was before the Court in *Padilla*. Furthermore, the *Teague* defense “is not ‘jurisdictional,’” and the State may waive or forfeit it in individual cases. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); see *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994). When a State forfeits the *Teague* bar, the Court may announce a new rule even though the case might otherwise have presented *Teague* issues. The State in *Padilla* did not raise *Teague* as a defense. For both of these reasons, the Court’s decision does not imply any conclusion about retroactivity.

Petitioner also argues (Br. 33) that *Padilla* “assumed” that similar claims would arise in habeas proceedings and the Court therefore must have assumed that its decision would have retroactive effect. But the Court’s discussion of the likelihood that defendants would “collaterally attack” their guilty pleas based on the *Padilla* decision, 130 S. Ct. at 1485-1486, will not bear that weight. The Court did not discuss *Teague*’s application or suggest that *Teague* would not apply. *Ibid.* And because the vast majority of convictions are imposed by state courts, and those courts may or may not apply a *Teague*-like state-law rule against retroactivity, the Court likely assumed that many defendants would seek to challenge their convictions through state collateral proceedings that would not implicate federal *Teague* issues.<sup>7</sup>

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<sup>7</sup> In 2006, for instance, federal convictions accounted for only six percent of all felony convictions. Sean Rosenmerkel, Matthew

2. The opinions of the four Justices who disagreed with the rule adopted by the *Padilla* Court confirm that *Padilla* announced a new rule. See *Beard*, 542 U.S. at 414-415.

Justice Alito, joined by the Chief Justice, concurred in the judgment, but disagreed with the Court's holding that "a criminal defense attorney [must] \* \* \* be required to provide advice on immigration law." *Padilla*, 130 S. Ct. at 1494. The concurring Justices emphasized that the "Court ha[d] never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice" about the collateral consequences of a conviction. *Id.* at 1488. The Court's decision, in their view, represented a "dramatic departure from precedent," *ibid.*, that "mark[ed] a major upheaval in Sixth Amendment law," *id.* at 1491, as well as a "dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment," *id.* at 1492. The concurring Justices would have held only that the Sixth Amendment requires a defense attorney to "refrain from unreasonably providing incorrect advice." *Id.* at 1487. In addition, "[w]hen [the] attorney is aware that a client is an alien," the concurring Justices would have required counsel to provide a general warning that "a criminal conviction may have adverse consequences under the immigration laws," *id.* at 1494, and an instruction that "if the alien wants advice on this issue, the alien should consult an immigration attorney," *id.* at 1487.

Petitioner argues (Br. 24) that she would have prevailed under the test advocated by the concurring Justices. But the relevant point is that the concurring Justices viewed *Padilla*'s holding—its requirement that

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Durose & Donald Farole, Jr., Bureau of Justice Statistics, *Statistical Tables: Felony Sentences in State Courts, 2006*, at 2 (2009).

counsel provide reasonable advice about immigration consequences—as a departure from the Court’s Sixth Amendment precedents. And in any event, the alternative rule proposed by the concurring Justices would likely have been a new rule itself, as the concurring Justices did not suggest that it was “dictated” by any of the Court’s prior decisions. See *Lambrix*, 520 U.S. at 528–529.

Justice Scalia, joined by Justice Thomas, dissented on the ground that “[t]he Sixth Amendment guarantees the accused a lawyer ‘for his defense’ against a ‘criminal prosecutio[n]’—not for sound advice about the collateral consequences of conviction.” *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting) (quoting U.S. Const. Amend. VI) (second alteration in original). According to the dissenting Justices, the Court’s holding broke from the Court’s precedents: “We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions.” *Id.* at 1495. The dissenting Justices found “no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand” and concluded that the Court had “never held, as the logic of [its] opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands.” *Ibid.*

Petitioner characterizes (Br. 23) the dissenting opinion as attempting to “impose a new limitation” on the Sixth Amendment. But for purposes of the “new rule” analysis, the point is that two Justices—like the overwhelming majority of lower federal and state appellate courts to consider the issue—believed that the Court’s decisions had never suggested that the Sixth Amend-



ment duty of advice extended beyond matters necessary to resolve the defendant's criminal jeopardy.

As petitioner observes (Br. 23), the "mere existence of a dissent" does not establish that a rule is new. *Beard*, 542 U.S. at 416 n.5. That is because "the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the \* \* \* rule." *Ibid.*; see also *Stringer v. Black*, 503 U.S. 222, 237 (1992). But here, the four concurring and dissenting Justices did not simply disagree with the rule announced by the Court; rather, they argued that *Padilla's* holding was a stark departure from prior precedent. In these circumstances, petitioner faces a heavy burden in establishing that no reasonable jurist could differ as to whether *Padilla* was compelled by precedent.

**C. Reasonable Jurists Could Have Concluded, Based On The Pre-*Padilla* Legal Landscape, That The Sixth Amendment Did Not Impose An Obligation To Advise Defendants About Removal Consequences**

An examination of this Court's Sixth Amendment precedent when petitioner's conviction became final in 2004 reveals why reasonable jurists could have concluded that the Sixth Amendment did not impose an obligation to advise a defendant about the removal consequences of pleading guilty because those consequences are beyond the scope of the criminal prosecution.

1. When petitioner's conviction became final, it was well established that the Sixth Amendment's guarantee of "Assistance of Counsel for [the defendant's] defence," U.S. Const. Amend. VI, conferred the right to *effective* assistance of counsel in defending against a criminal prosecution, including in deciding whether to plead guilty or go to trial. *Strickland*, 466 U.S. at 687-690; *Hill*, 474 U.S. at 56-59. Specifically, the Court had held

that counsel was required to advise the defendant on whether, given the strength of the prosecution and defense cases, the defendant had any realistic opportunity to avoid conviction on some or all charges by going to trial, and so whether pleading guilty would not represent an advantageous resolution of the proceedings. See *Libretti v. United States*, 516 U.S. 29, 50-51 (1995); *Hill*, 474 U.S. at 59; *Tollett v. Henderson*, 411 U.S. 258, 266-268 (1973); *Parker v. North Carolina*, 397 U.S. 790, 797-798 (1970); *McMann v. Richardson*, 397 U.S. 759, 769-771 (1970); *Brady v. United States*, 397 U.S. 742, 748 & n.6 (1970). The Court had also established that counsel must explain the penalties that the defendant faced in the criminal proceeding and the plea's likely effect on the nature and severity of the punishment. See *Hill*, 474 U.S. at 56; *Tollett*, 411 U.S. at 268. And the Court had held that counsel had a duty to ensure that the defendant understood the rights within the criminal process that he would surrender by pleading guilty. *Libretti*, 516 U.S. at 50-51; *Brady*, 397 U.S. at 748 n.6. All of these affirmative obligations promoted the defendant's capacity to intelligently evaluate how to resolve his jeopardy in the criminal proceeding.

Before *Padilla*, the Court had never suggested, let alone held, that the Sixth Amendment required counsel to advise the defendant about matters that are *not* part of the criminal jeopardy that a defendant faces. Indeed, in *Hill*, the Court considered a claim that the defendant had been misadvised concerning parole eligibility, a matter that a panel of the court of appeals had deemed "collateral." 474 U.S. at 55. The Court in *Hill* found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally inef-



fective assistance of counsel” because the defendant in that case could not demonstrate prejudice. *Id.* at 60. *Hill* thus left open whether even misadvice about parole eligibility violated a duty under *Strickland*. That decision hardly established that consequences even more remote from criminal jeopardy might be included in counsel’s Sixth Amendment duty. Thus, it would not have been “illogical or even \* \* \* grudging,” *Butler*, 494 U.S. at 415, for courts considering this Court’s decisions to conclude that counsel’s duty to advise a defendant about pleading guilty did not extend to matters that were not part of the adversarial criminal process.

Although petitioner emphasizes that the Court’s Sixth Amendment decisions had “never applied” a distinction between direct and collateral consequences, Br. 10 (quoting *Padilla*, 130 S. Ct. at 1481), that fact falls far short of establishing—as petitioner must—that *no reasonable jurist* could have concluded that such a distinction was consistent with existing law. See *Lambrrix*, 520 U.S. at 527-528. To the contrary, reasonable jurists could have—and did—conclude that the Court’s decisions supported limiting the Sixth Amendment duty of advice to those consequences that are imposed as part of the criminal case. See pp. 12-17, *supra*.

2. The Court’s decisions also indicated that the Court viewed removal proceedings as entirely separate from a defendant’s criminal jeopardy. Certainly no decision compelled the conclusion that removal was sufficiently “close[ly] connect[ed] to the criminal process” to be treated as falling within the Sixth Amendment’s scope, *Padilla*, 130 S. Ct. at 1482, and *Padilla* did not suggest otherwise.

As the Court explained in *Lopez-Mendoza*, 468 U.S. at 1038-1039, “[a] deportation proceeding is a purely civ-

il action” instituted by immigration authorities—now, the Department of Homeland Security—rather than a sentencing court. A removal proceeding “is in no proper sense a trial and sentence for a crime or offence,” and an order of removal, though its implications may be severe, “is not a punishment for crime.” *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); see also *St. Cyr*, 533 U.S. at 324.

At the time of petitioner’s conviction, the Court had also recognized that although removal was a potential consequence of conviction, it was not imposed by the sentencing court, but rather fell in the category of “disabilities and burdens [that] may flow” from a criminal judgment.<sup>8</sup> See *Fiswick v. United States*, 329 U.S. 211, 221-222 & n.8 (1946) (explaining that removal consequences, along with the potential loss of civil rights re-

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<sup>8</sup> Under 8 U.S.C. 1228(c)(1), a federal district court may enter an order of judicial removal at the time of sentencing in a criminal case, upon the request of the United States Attorney, with the concurrence of immigration officials, and in the discretion of the court. But the Court never suggested that the concomitant entry of a judicial order of removal rendered the prospect of removal part of the criminal jeopardy faced by the defendant in the prosecution, and the *Padilla* Court did not rely on the existence of judicial removal orders in concluding that removal consequences are “close[ly] connect[ed]” to criminal jeopardy. 130 S. Ct. at 1482.

In addition, under prior immigration statutes a sentencing judge could enter a judicial recommendation against deportation (JRAD). See *Padilla*, 130 S. Ct. at 1479-1480. As *Padilla* explained, the Second Circuit had held that a defendant had a right to effective assistance in seeking a JRAD. *Id.* at 1480 (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)). But Congress eliminated the JRAD procedure in 1990, and the *Padilla* Court did not rely on it in concluding that removal consequences under current immigration law are “close[ly] connect[ed]” to the criminal process. *Id.* at 1480-1482.

sulting from a conviction, could keep a challenge to a conviction from being moot). The Court thus repeatedly described removal as a “collateral consequence[]” and listed it along with other civil disabilities that may arise from a conviction by operation of law but are not imposed by the sentencing court. See, *e.g.*, *Sibron v. New York*, 392 U.S. 40, 54-56 (1968) (listing removal along with use of a conviction to impeach subsequent testimony); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (“as a collateral consequence” of conviction, government could seek to bar defendants’ reentry into the country).

Even after removal became a “nearly \* \* \* automatic” consequence of many criminal convictions, *Padilla*, 130 S. Ct. at 1481, the Court did not, before *Padilla*, extend counsel’s Sixth Amendment duty of advice to removal consequences. In 1996, the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, and the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, closed off avenues of discretionary relief from removal for noncitizens who committed certain removable offenses. *Padilla*, 130 S. Ct. at 1480. But even after the enactment of IIRIRA and AEDPA in 1996, the Court referred to removal as a “collateral consequence[]” of conviction. *Spencer v. Kemna*, 523 U.S. 1, 9 (1998). And the Court continued to cite *Lopez-Mendoza* for the proposition that deportation was not a criminal penalty. See *United States v. Balsys*, 524 U.S. 666, 671-672 (1998); *St. Cyr*, 533 U.S. at 324.

3. The only Supreme Court decision on which petitioner relies in arguing (Br. 22) that “creating a categorical distinction between direct and collateral conse-

quences would have been \* \* \* unsupportable” under pre-*Padilla* law is the immigration-law decision in *St. Cyr*. There, the Court applied the civil retroactivity framework set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), to Congress’s repeal of certain discretionary relief from removal in IIRIRA. *St. Cyr*, 533 U.S. at 321-323. In considering whether retroactive application of the repeal provision would unfairly upset the legitimate expectations of defendants who might face removal as a result of pleading guilty, the Court stated that alien defendants considering whether to plead guilty are generally “acutely aware of the immigration consequences of their convictions.” *Id.* at 322. And, the Court observed, if alien defendants were not already aware of the availability of discretionary relief, “competent defense counsel, following the advice of numerous practice guides, would have advised” them of it. *Id.* at 323 n.50.

These descriptive statements, based as they were on “the advice of numerous practice guides,” did not suggest, much less hold, that the *Sixth Amendment* imposed a duty on counsel to advise about removal consequences, or that counsel who failed to provide such advice would not be “competent” for purposes of the Sixth Amendment. To the contrary, the Court took pains to emphasize that it did not question its longstanding understanding that “deportation is [not] punishment for past behavior” and that removal proceedings do not implicate the “various protections that apply in the context of a criminal trial.” *St. Cyr*, 533 U.S. at 324 (internal quotation marks and citation omitted). Thus, the Court’s observations about counsel’s practice are hardly the sort of on-point holding that the Court has required



before concluding that a rule is dictated by prior precedent. Cf. *Lambrix*, 520 U.S. at 530.

4. Petitioner also argues (Br. 20) that the standards set forth by professional associations like the American Bar Association established that when petitioner's conviction became final, it would have been unreasonable under *Strickland* not to advise defendants about removal consequences. But while this Court has treated prevailing professional norms as helpful "guides" to determining what constitutes reasonably effective performance under *Strickland*, it has never suggested that such standards speak to, much less define, the scope of the right to counsel under the Sixth Amendment. See *Padilla*, 130 S. Ct. at 1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment). And even with respect to what constitutes reasonable representation in cases in which *Strickland* applies, professional standards are "only guides to what reasonableness means, not its definition." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (per curiam) (internal quotation marks and citation omitted); see *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000). Significantly, none of the sources of "prevailing professional norms" cited in *Padilla*, 130 S. Ct. at 1482, suggested that defense counsel have a constitutional duty to advise on collateral consequences. Indeed, the commentary following one of the cited standards specifically stated that the standard's imposition of such a duty went beyond any constitutional requirement imposed by the courts. *ABA Standards for Criminal Justice: Pleas of Guilty* 14-3.2(f) cmt. at 126 & n.25 (3d ed. 1999).

Because these aspirational professional guidelines do not define the scope of the Sixth Amendment guarantee of effective assistance, they cannot establish that *Padilla*'s rule was dictated by precedent. Cf. *Sawyer*, 497

U.S. at 238-239 (prior state-law rules did not establish that a rule should be applied retroactively because “the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution”) (quoting *Dugger v. Adams*, 489 U.S. 401, 409 (1989)).

**D. *Padilla*’s Holding Is Not Simply An Application Of *Strickland* To Novel Facts**

Petitioner’s primary argument against recognizing *Padilla* as a new rule is that *Padilla* simply applied the familiar *Strickland* ineffective-assistance standard in a new factual setting. Pet. Br. 16-19, 21-22. “Where the beginning point” of the Court’s analysis “is a rule of \* \* \* general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment)). Petitioner cannot avail herself of this principle, however, because *Strickland* was not “the beginning point” of the Court’s analysis.

1. Petitioner argues that *Padilla* “reaffirmed” that “[w]henEVER a client is a criminal defendant, the Sixth Amendment applies” and counsel “must give reasonable advice according to ‘prevailing professional norms.’” Pet. Br. 21-22 (quoting *Strickland*, 466 U.S. at 688). For the reasons discussed above, petitioner’s characterization of the *Strickland* rule overlooks both the Court’s pre-*Padilla* Sixth Amendment decisions and the Court’s reasoning in *Padilla*. Before *Padilla*, the Court had *rejected* the use of professional standards to define the scope of the Sixth Amendment, see p. 30, *supra*, and it had never suggested that the Sixth Amendment re-



quired advice beyond what was necessary to assist the defendant in advantageously resolving the criminal charges against him, see pp. 24-26, *supra*. The *Padilla* Court thus had to address the antecedent and threshold question of the Sixth Amendment's application before deciding how *Strickland*'s standard would apply to advice about immigration consequences—*i.e.*, whether and in what circumstances counsel would render deficient performance by failing to give such advice. *Padilla*, 130 S. Ct. at 1482; see pp. 18-20, *supra*.

Petitioner contends that the *Padilla* Court's reliance on "[p]revailing norms of practice as reflected in American Bar Association standards and the like," 130 S. Ct. at 1482 (brackets in original), demonstrates that the Court simply applied *Strickland* to new facts. But the Court did not consult professional standards in answering the antecedent and threshold question whether the Sixth Amendment applied to advice about removal consequences. See *id.* at 1481-1482. Rather, the Court used professional standards as "guides to determining what is reasonable" performance for purposes of *Strickland*'s first prong—a question that it reached only after concluding that "*Strickland* applies to *Padilla*'s claim" in the first place. *Id.* at 1482.

2. The decisions on which petitioner relies (Br. 16-19) in arguing that ineffective-assistance decisions generally do not announce new rules are all distinguishable from *Padilla*. For the most part, the only question in those cases was *how Strickland* applied to a new factual situation clearly within its ambit—not *whether* the advice in question fell outside the Sixth Amendment's guarantee of assistance of counsel in a "criminal prosecution[]." U.S. Const. Amend. VI.

In *Flores-Ortega*, *supra*, the Court addressed “the proper framework for evaluating an ineffective assistance of counsel claim[] based on counsel’s failure to file a notice of appeal without respondent’s consent.” 528 U.S. at 473. The Court’s decisions had already established that the Sixth Amendment entitled a defendant to advice concerning whether to file a direct appeal and assistance in doing so, *id.* at 477-478, and so the Court defined the question presented in *Flores-Ortega* as whether “counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other,” *id.* at 477. Unlike in *Padilla*, then, *Flores-Ortega* simply considered *how* the *Strickland* test should apply, not whether the Sixth Amendment governed the topic in the first place.<sup>9</sup>

*Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams*, *supra*, also concerned duties that were already understood as falling within *Strickland*’s ambit.<sup>10</sup> In *Wiggins*, the Court stated that it had not made “new law” in *Williams*, which held that counsel’s unreasonable failure to investigate a defendant’s background in preparation for a capital sentencing constituted ineffective assistance. *Wiggins*, 539 U.S. at 522. The Court had established in

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<sup>9</sup> Contrary to petitioner’s argument (Br. 16-17), the Court did not decide whether *Teague* barred relief, having denied certiorari on that question. See *Roe v. Flores-Ortega*, 526 U.S. 1097 (1999).

<sup>10</sup> *Williams* and *Wiggins* were decided pursuant to 28 U.S.C. 2254(d)(1) (2000), which requires habeas petitioners challenging a state-court conviction to demonstrate the state court had “unreasonabl[y]” applied “clearly established Federal law, as determined by the Supreme Court.” This Court has indicated that “whatever would qualify as an old rule” under *Teague* would also qualify as “clearly established” under Section 2254(d)(1), with the caveat that Section 2254(d)(1) “restricts the source of clearly established law to this Court’s jurisprudence.” *Williams*, 529 U.S. at 412.

*Strickland* itself that counsel had a duty to make reasonable investigations of potential mitigating factors in a capital case. See *Strickland*, 466 U.S. at 690-691. Accordingly, the *Williams* Court explained that the defendant's claims "are squarely governed by our holding in *Strickland*." *Wiggins*, 539 U.S. at 522 (quoting *Williams*, 529 U.S. at 390). *Williams* and *Wiggins* thus merely refined the scope of counsel's duty to investigate under *Strickland* in the context of specific factual circumstances.<sup>11</sup> See *Williams*, 529 U.S. at 390; *Wiggins*, 539 U.S. at 521-522.

*Lafler v. Cooper*, 132 S. Ct. 1376 (2012), is also inapposite. There, the Court considered "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial," *id.* at 1384, and held that defendants may demonstrate *Strickland* prejudice in such circumstances, even if they were convicted after a fair trial, *id.* at 1386. The State did not raise *Teague* as a barrier to relief, see 10-209 Pet. i, but did rely on AEDPA's requirement that the state-court decision must be contrary to or an unreasonable application of clearly established federal law before relief may be granted, 28 U.S.C. 2254(d)(1). See 10-209 Pet. Br. 26-34. This Court rejected that reliance because the state court had acted "contrary to" federal law by rejecting Lafler's ineffective-assistance claim on the ground that his plea was knowing and voluntary, rather than applying *Strickland*. 132 S. Ct. at 1390. The Court therefore concluded that under AEDPA "the federal courts in this habeas

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<sup>11</sup> *Rompilla v. Beard*, 545 U.S. 374 (2005), similarly involved the application of *Strickland* to counsel's failure to investigate in connection with a capital sentencing. But cf. Pet. Br. 18. No question existed in *Rompilla* that the *Strickland* standard applied. See 545 U.S. at 377.

action can determine the principles necessary to grant relief." *Ibid.*

Finally, *Francis v. Franklin*, 471 U.S. 307 (1985), and *Stringer, supra*, are also distinguishable. But cf. Pet. Br. 13-14. The Court held in *Yates v. Aiken*, 484 U.S. 211 (1988), that *Franklin* was an application of the rule against mandatory presumptions against the defendant that was announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), because *Franklin* had stated that the question in "this case is almost identical to that before the Court in *Sandstrom*." *Yates*, 484 U.S. at 217. In *Stringer*, 503 U.S. at 228-229, the Court held that the result in *Clemons v. Mississippi*, 494 U.S. 738 (1990), was dictated by its earlier decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Godfrey* held that States—in that case, Georgia—may not use vague aggravating factors in capital cases, and the Court held in *Clemons* that that principle applied "*a fortiori*" to Mississippi's use of aggravating factors despite immaterial differences in the States' sentencing systems. *Stringer*, 503 U.S. at 228-229. Nothing in *Strickland* or any of the Court's other Sixth Amendment cases similarly compelled *Padilla*'s rule. Rather, that rule broke new legal ground and announced a duty not dictated by precedent. Accordingly, it is a new rule under *Teague*.

## II. THE *TEAGUE* FRAMEWORK APPLIES TO COLLATERAL CHALLENGES TO FEDERAL CONVICTIONS BASED ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to arguing that *Padilla* did not establish a new rule, petitioner asserts two broader arguments against *Teague*'s application: first, that *Teague* is entirely inapplicable to collateral review of federal convictions; and second, that even if the *Teague* framework is

otherwise applicable on collateral review of federal convictions, it does not apply to claims of ineffective assistance of counsel. Petitioner failed to raise these arguments before the lower courts, and this Court should therefore not consider them. In any event, petitioner's arguments are without merit.

**A. Petitioner's Argument That The *Teague* Bar On Retroactivity Does Not Apply To Section 2255 Motions Or To Ineffective-Assistance Claims Is Forfeited**

Petitioner's challenge to the applicability of the *Teague* framework is not properly before the Court. In the district court and the court of appeals, petitioner did not question *Teague*'s applicability to federal convictions or its applicability to ineffective-assistance claims.<sup>12</sup> The court of appeals accordingly did not address either of those arguments. Pet. App. 6a; *id.* at 19a (Williams, J., dissenting) (agreeing that *Teague* framework applied). Nor did petitioner raise either argument in her petition for a writ of certiorari. See Pet. 6 n.1 (observing that the Court has not held that *Teague* applies to collateral review of federal convictions, without suggesting that the Court should resolve the issue in this case, and without arguing that *Teague* does not apply to ineffective-assistance claims); Br. in Opp. 10 n.2. Petitioner's ar-

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<sup>12</sup> Petitioner did raise her claim that *Teague* does not apply on collateral review of federal convictions (but not her claim that *Teague* does not apply to ineffective-assistance claims) in her unsuccessful petition for rehearing en banc, see Pet. for Reh'g & Reh'g En Banc 11, but that was too late to preserve the issue. Although circuit precedent foreclosed petitioner's argument that *Teague* applies to federal convictions, see *Van Daalwyk v. United States*, 21 F.3d 179, 183 (7th Cir. 1994), petitioner was required to raise both issues in her opening brief in order to preserve them. See *Logan v. Wilkins*, 644 F.3d 577, 583 (7th Cir. 2011).



guments are therefore forfeited, and this Court should not consider them. See *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (declining to consider forfeited argument); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976).

**B. The *Teague* Rule Applies On Collateral Review Of Federal Convictions**

Petitioner argues (Br. 27-33) that *Teague*'s non-retroactivity rule does not apply to collateral challenges to federal convictions because such challenges do not implicate federalism concerns. But *Teague* is not limited to federalism concerns. *Teague* also protects the societal interest in the finality of convictions, and that interest is independently sufficient to justify *Teague*'s application to federal convictions—as Justice Harlan explicitly recognized in the opinion in which he set forth the retroactivity principles that the Court later adopted in *Teague*. See *Mackey v. United States*, 401 U.S. 667 (1971).

1. In *Teague*, the Court adopted a retroactivity framework that “focus[ed], in the first instance, on the nature, function, and scope of” collateral challenges to final convictions. 489 U.S. at 305-306 (plurality opinion). The Court explained that because “[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final,” *id.* at 306, limiting the application of new rules in collateral challenges serves the important interest in the finality of convictions, *id.* at 308-309. “Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our crimi-



nal justice system,” *id.* at 309, by “continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards,” *id.* at 310. See also, *e.g.*, *Beard*, 542 U.S. at 413; *Stringer*, 503 U.S. at 228; *Sawyer*, 497 U.S. at 242; *Butler*, 494 U.S. at 413-414.

The *Teague* rule also serves to “foster[] comity between federal and state courts.” *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); see *Teague*, 489 U.S. at 308 (plurality op.). Continual application of new constitutional rules to cases on collateral review “may be more intrusive than the enjoining of criminal prosecutions,” *id.* at 310 (citing *Younger v. Harris*, 401 U.S. 37, 43-54 (1971)), and “[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands,” *ibid.* (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982)).

2. As petitioner observes (Br. 29), comity concerns are not implicated by collateral review of federal convictions. Nonetheless, as the Court recognized in *Danforth*, 552 U.S. at 281 n.16, “[m]uch of the reasoning” underlying the *Teague* rule “seems equally applicable in the context of § 2255 motions.”

Specifically, the finality concerns that animate the *Teague* rule apply with full force to federal convictions. “[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments.” *United States v. Frady*, 456 U.S. 152, 166 (1982); see *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Like state convictions, federal convictions give rise to societal interests “in insuring that there will at some point be the certainty that comes with an end to litigation,”

assuring "that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community," and avoiding resource-intensive retrials, which may be unreliable when evidence has become stale and witnesses unavailable. *Mackey*, 401 U.S. at 690-691 (Harlan, J., concurring in the judgments in part and dissenting in part) (internal quotation marks omitted). In the federal system as well as in the States, moreover, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of [judicial] procedures." *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979).

Section 2255 motions challenging federal convictions threaten to undermine these finality interests just as surely as habeas petitions challenging state convictions. Section 2255 was "enacted as a functional equivalent for habeas corpus," *Danforth*, 552 U.S. at 281 n.16, in order to "meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts," *United States v. Hayman*, 342 U.S. 205, 219 (1952). Congress, in enacting Section 2255, "did not purport to modify the basic distinction between direct review and collateral review," *Addonizio*, 442 U.S. at 184, and Section 2255, like habeas corpus, permits a "collateral inquiry into the validity of the conviction," *Hayman*, 342 U.S. at 222. Because any collateral attack on a conviction "after society's legitimate interest in the finality of the judgment has been perfected" threatens to undermine that interest, *Fradley*, 456 U.S. at 164, the Court has recognized that finality concerns justify "narrowly limiting the grounds for collateral attack on final judgments" in federal cases as well as state-court cases. *Addonizio*, 442 U.S. at 184 & n.11, 186-187 (holding that

collateral attack under Section 2255 should be limited to errors of the sort that are cognizable in habeas challenges to state convictions).

For these reasons, the Court has previously held that the interest in finality of federal convictions is sufficient in itself to justify applying to Section 2255 motions the procedural-default rule that protects comity as well as finality in the context of habeas review of state convictions. In *Frady*, the court held that because final federal judgments should not be subject to "a series of endless postconviction collateral attacks," 456 U.S. at 165, the cause-and-prejudice standard that already applied to forfeited claims raised in a federal collateral challenge to a state-court conviction, see *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977), should also apply to forfeited claims asserted in a Section 2255 motion. *Frady*, 456 U.S. at 162-169. The Court explained that the "considerations of comity" that had led it to adopt the cause-and-prejudice standard in the state-conviction context "do not constrain us here." *Id.* at 166. But because the federal government's "interest in the finality of its criminal judgments" was as great as the States' interest, the Court found "no basis for affording federal prisoners a preferred status when they seek postconviction relief." *Ibid.* See also *Francis*, 425 U.S. at 542.

Similarly, finality concerns amply justify applying *Teague* in the context of collateral attacks on federal convictions. Permitting final federal convictions to be overturned based on new procedural rules would undermine confidence in the federal criminal justice system by subjecting federal convictions to perpetual uncertainty. It would also require the federal government continually to devote resources to defending final convictions against later developments in the law and

threaten the government's ability to conduct reliable retrials. See *Teague*, 489 U.S. at 310; *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part). And it would impede federal rulemakers' ability to frame procedural rules to comply with current constitutional standards and thereby protect the finality of federal convictions.<sup>13</sup>

In addition, allowing federal prisoners to collaterally challenge their convictions based on a new rule of criminal procedure while denying that right to similarly situated state prisoners would create inequities that would further undermine confidence in the criminal justice system. See *Teague*, 489 U.S. at 305 (expressing con-

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<sup>13</sup> Here, for example, before *Padilla*, the Federal Rules of Criminal Procedure did not require a court to advise a noncitizen defendant that he may face removal as a consequence of conviction. "In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*," however, "the Advisory Committee [on the Federal Rules of Criminal Procedure] concluded that a warning regarding possible immigration consequences ought to be required as a uniform practice." See Memorandum from Hon. Richard C. Tallman, Chair, Advisory Comm. on Fed. R. Crim. P., to Hon. Lee H. Rosenthal, Chair, Standing Comm. on R. of Practice & P. 2 (Dec. 8, 2010), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CR\\_Dec\\_2010.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CR_Dec_2010.pdf). A proposed amendment to that effect was published for comment and is now before the Judicial Conference. See Pending Rules Amendments, <http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx>; Memorandum from Hon. Reena Raggi, Chair, Advisory Comm. on Fed. R. Crim. P., to Hon. Mark R. Kravitz, Chair, Standing Comm. on R. of Practice & P. 2-8 (May 17, 2012), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06\\_Revised.pdf#pagemode=bookmarks](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06_Revised.pdf#pagemode=bookmarks). Such a procedure would generally protect against after-the-fact claims of prejudice from deficient attorney performance. But until *Padilla*, it was not evident that such a constitutional claim existed and that the federal criminal rules should respond to it.



cern that its prior retroactivity framework “led to unfortunate disparity in the treatment of similarly situated defendants on collateral review”). These concerns establish that *Teague*’s general bar on retroactive application of new rules must apply in challenges to federal convictions.<sup>14</sup>

Accordingly, every court of appeals to consider the issue has concluded that finality and equality-of-treatment concerns mandate applying *Teague* in collateral review of federal convictions. See *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-668 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *Daniels v. United States*, 254 F.3d 1180, 1193-1194 (10th Cir. 2001); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998), cert. denied, 525 U.S. 1073 (1999); *United States v. Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk v. United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti v. United States*, 917 F.2d 92, 95 (2d Cir. 1990).<sup>15</sup>

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<sup>14</sup> Petitioner argues (Br. 29) that *Teague*’s finality concerns do not apply in the Section 2255 context because *Teague* was premised on the assumption that federal habeas review of state convictions would take place only after the prisoner had raised his collateral claims in a state postconviction proceeding. *Teague* contains no such suggestion. Federal convictions, like state convictions, become final upon the conclusion of direct review. *Clay v. United States*, 537 U.S. 522, 527 (2003). That status gives rise to *Teague*’s finality concern, which is based on the fact that the prisoner is collaterally attacking “a final conviction, state or federal, [that] has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it,” *Mackey*, 401 U.S. at 689-690 (Harlan, J. concurring in the judgments in part and dissenting in part), not on the likelihood that state prisoners have already had their collateral claims adjudicated once by a state court.

<sup>15</sup> The remaining courts of appeals routinely apply *Teague* on Section 2255 review. See, e.g., *United States v. Amer*, 681 F.3d 211, 212 (5th Cir. 2012); *Sun Bear v. United States*, 644 F.3d 700, 703-704 (8th



3. The origins of *Teague*'s "new rule" principle reinforce the conclusion that *Teague* applies to federal convictions. *Teague* "adopt[ed] Justice Harlan's approach to retroactivity for cases on collateral review," 489 U.S. at 292, which he had laid out in two earlier cases involving federal convictions. See *Mackey*, 401 U.S. at 675-702 (Harlan, J., concurring in the judgments in part and dissenting in part) (collateral challenge to federal convictions); *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (direct appeal of federal conviction). Justice Harlan explained that retroactivity principles should be adapted to the collateral nature of the proceeding in which they would be applied. *Mackey*, 401 U.S. at 682. Because habeas corpus and Section 2255 motions are "virtually congruent" remedies, Justice Harlan did "not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief." *Id.* at 681 n.1. Justice Harlan grounded the principle that new rules should not be applicable on collateral review in finality concerns, explaining that because "a final conviction, *state or federal*, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it," convictions should not be subject to perpetual challenge based on evolving constitutional rules. *Id.* at 689-690 (emphasis added).

*Teague* itself had no occasion to address federal convictions because the case concerned a collateral challenge to a state conviction. But the plurality defined the

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Cir. 2011); *Valentine v. United States*, 488 F.3d 325, 328-331 (6th Cir. 2007), cert. denied, 552 U.S. 1217 and 554 U.S. 904 (2008); *In re Fashina*, 486 F.3d 1300, 1303 (D.C. Cir. 2007); *Owens v. United States*, 483 F.3d 48, 70 (1st Cir. 2007); *Lloyd v. United States*, 407 F.3d 608, 611-612 (3d Cir.), cert. denied, 546 U.S. 916 (2005).

concept of a “new rule” by noting that one arises when it “imposes a new obligation on the States or the Federal Government.” *Teague*, 489 U.S. at 301 (emphasis added). And *Teague*’s adoption of Justice Harlan’s “general rule of nonretroactivity for cases on collateral review,” 489 U.S. at 307, as well as Justice Harlan’s emphasis on finality concerns, *id.* at 309-310, suggests that the Court also endorsed his conclusion that the nonretroactivity principle should apply to both federal and state convictions.

Indeed, the Court has subsequently applied the *Teague* framework in a Section 2255 challenge, without any hint that *Teague* might not apply in challenges to federal convictions. In *Bousley v. United States*, 523 U.S. 614 (1998), Bousley contended on collateral review that *Bailey v. United States*, 516 U.S. 137 (1995), established that he had been misinformed about the elements of his offense and that his guilty plea was therefore not knowing and intelligent. Because *Bailey* was decided after Bousley’s conviction became final, the Court considered whether Bousley’s claim was *Teague*-barred, and concluded that it was not. *Bousley*, 523 U.S. at 620-621 (stating that *Teague* is inapplicable to the situation in which the Court construes the elements of a criminal statute). The Court would have had no occasion to undertake this inquiry if *Teague* were inapplicable on collateral review of federal convictions.

### C. The *Teague* Rule Applies To Ineffective-Assistance-Of-Counsel Claims Raised On Collateral Review Of Federal Convictions

Petitioner next contends (Br. 29-33) that *Teague* should not apply to collateral challenges to federal convictions based on ineffective-assistance-of-counsel

claims because such claims do not implicate the finality concerns that animate the *Teague* nonretroactivity rule.

1. As an initial matter, petitioner's argument that *Teague* should not apply to ineffective-assistance claims, as opposed to other grounds on which convictions may be challenged, overlooks *Teague*'s judgment that retroactivity principles should not vary based on the characteristics of the particular rule at issue.

Before *Teague*, the Court decided if a new rule should be applied retroactively by considering its purpose, law-enforcement reliance on the old rule, and the effect of applying a new rule on judicial administration. See *Desist*, 394 U.S. at 249 (quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)); *Linkletter v. Walker*, 381 U.S. 618, 636-640 (1965). That approach led to unpredictable and inequitable results, as defendants whose cases were in the same procedural posture would be treated differently based on the rule they sought to invoke or the fact that the new rule happened to be announced in their case. See *Danforth*, 552 U.S. at 273-274; *Teague*, 489 U.S. at 302-303.

*Teague* adopted Justice Harlan's view that retroactivity principles should be based on the finality-disrupting nature of the collateral proceeding, rather than a case-by-case inquiry into the nature and purpose of the new rule itself. *Mackey*, 401 U.S. at 682-683 (Harlan, J., concurring in the judgments in part and dissenting in part); *id.* at 681; *Teague*, 489 U.S. at 306. Under the *Teague* approach, all new rules are presumptively inapplicable on collateral review unless they satisfy *Teague*'s narrow exceptions for watershed procedural rules and rules that

place primary conduct beyond the power of criminal law to proscribe.<sup>16</sup> 489 U.S. at 311.

Notwithstanding this framework, petitioner would have the Court examine the nature of the *Padilla* rule—the fact that it concerns counsel’s duty of effective assistance, which is normally litigated in a collateral attack—in determining whether *Teague*’s nonretroactivity rule applies in the first place. But *Teague*’s finality concerns arise from the nature of a collateral proceeding, and every collateral challenge implicates those concerns, regardless of the grounds of collateral attack.

2. Petitioner argues (Br. 31) that *Teague* should not apply to ineffective-assistance challenges to federal convictions because such claims ordinarily are adjudicated for the first time on collateral review. That consideration, in her view, overrides the finality concerns that normally justify *Teague*. Petitioner is incorrect.

a. Petitioner’s argument is based primarily on *Massaro v. United States*, 538 U.S. 500, 504-505 (2003). There, the Court overturned the Second Circuit’s application of procedural-default rules to ineffective-assistance claims raised for the first time in a Section 2255 motion. Under the Second Circuit’s regime, federal prisoners ordinarily were excused from raising ineffective-assistance claims on direct appeal because determining the adequacy of trial representation often requires factual findings based on evidence outside the trial record. But if the ineffective-assistance claim could have been raised and resolved on direct appeal, the Second Circuit required the prisoner to demonstrate cause and prejudice before raising the claim for the first time on collateral review. *Id.* at 502-503. In overturning

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<sup>16</sup> Petitioner does not contend that either exception applies here. Pet. Br. 5-6; Pet. App. 6a.

that approach, this Court explained that while the procedural-default rule is designed to promote finality and conserve judicial resources, the Second Circuit's regime did neither. *Id.* at 506-507. Given that most ineffective-assistance claims would end up being adjudicated for the first time on collateral review anyway—and the district court was the most suitable forum for resolving fact-specific claims—applying the procedural-default rule to ineffective-assistance claims on collateral review created additional litigation while “produc[ing] no benefit.” *Id.* at 507. The Court therefore concluded that “[i]t is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits.” *Ibid.*

Petitioner argues (Br. 31) that because the Court held that the procedural-default doctrine does not bar ineffective-assistance claims raised for the first time in Section 2255 motions, *Teague* should not apply to ineffective-assistance claims. As petitioner observes, the procedural-default doctrine, like *Teague*, is rooted in finality concerns. But the two doctrines address distinct aspects of the general interest in the finality of convictions. The procedural-default doctrine prevents the harm to finality and judicial economy that would result from resurrecting forfeited claims without justification, and it ensures that courts can correct their own errors at the earliest opportunity. *Massaro*, 538 U.S. at 504; *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). In contrast, the *Teague* rule reflects a categorical judgment that convictions should not be perpetually open to challenge based on new developments in the law, except in the narrow circumstances delineated by the *Teague* exceptions. See *Mackey*, 401 U.S. at 688-692 (Harlan, J., concurring in the judgments in part and dissenting in



part). The *Massaro* Court's practical conclusion about the inefficiencies generated by applying the procedural-default doctrine to ineffective-assistance claims does not suggest that *Teague*'s finality concerns are inapplicable to such claims. As with other nonwatershed procedural new rules, *Teague* is necessary to protect final judgments of conviction against continual reexamination for attorney ineffectiveness under "intervening changes in constitutional interpretation." *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 689 (Harlan, J., concurring in the judgments in part and dissenting in part)); see also *id.* at 309 ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.") (quoting *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in the judgments in part and dissenting in part)). The problem is exacerbated when, years after a judgment has become final and a sentence served, a conviction is subject to perpetual uncertainty and challenge in *coram nobis* proceedings—long after the federal government may be able to defend the conviction or reprosecute the offense.

Petitioner also relies (Br. 31) on the Court's statement in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that where a state-court collateral proceeding is "the first designated proceeding" for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317. The point of the analogy between direct review and initial collateral review, however, was to demonstrate why, "[w]ithout the help of an adequate attorney,"

a prisoner will have “difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim” in an initial-review collateral proceeding. *Ibid.* The Court therefore held that ineffective assistance of counsel in state “initial review” collateral-review proceedings “may establish cause for a prisoner’s procedural default” of a claim of ineffective assistance at trial. *Id.* at 1315. Nothing in *Martinez* suggests that the *Teague* framework is inapplicable to ineffective-assistance claims.

b. Petitioner also contends (Br. 30) that because *Massaro* holds that ineffective-assistance claims are most naturally brought on collateral review, a defendant lacks a “full and fair opportunit[y]” to assert an ineffective-assistance claim relying on a novel rule before his conviction has become final. Therefore, petitioner argues, *Teague* should not bar the assertion of ineffective-assistance claims based on new rules on collateral review of federal convictions. *Ibid.*

The premise of petitioner’s argument is incorrect. *Massaro* does not prohibit a federal defendant from bringing his ineffective-assistance claim on direct review. 538 U.S. at 508. To the extent that a defendant seeks to establish a new rule in the course of challenging his conviction on ineffective-assistance grounds, he has the opportunity to bring the claim on direct review. While courts of appeals considering a direct appeal may ordinarily “prefer” to dismiss ineffective-assistance claims in favor of allowing the defendant to raise them on collateral review, they “may choose to entertain these claims on direct appeal” if doing so “would be in the interest of justice.” *United States v. Hasan*, 586 F.3d 161, 170 (2d Cir. 2009); *United States v. Cook*, 356 F.3d 913, 919-920 (8th Cir. 2004). A defendant’s assertion that he seeks to rely on a new rule that *Teague* would bar on

collateral review would provide ample justification for considering the claim on direct review. And when a court of appeals believes that factual development would benefit an ineffective-assistance claim raised on direct appeal, it may remand to the district court for that purpose. See, e.g., *Hasan*, 586 F.3d at 170; *United States v. Burroughs*, 613 F.3d 233, 238 (D.C. Cir. 2010).

In any event, petitioner is wrong in arguing that *Teague*'s operation turns on the extent to which the prisoner could have or would have sought application of the relevant new rule on direct review. Petitioner appears to argue that if a defendant did not have a "fair opportunity" to raise a claim seeking a new rule on direct appeal, the claim should be exempt from *Teague*'s bar on retroactivity when it is raised on collateral review.<sup>17</sup> Pet. Br. 30-31. That is a sweeping contention, because it could not be limited to ineffective-assistance claims. A defendant may equally assert that he lacked a "fair opportunity" to raise a claim on direct appeal if the factual premise of, or the motivation to bring, the claim did not arise until after the conclusion of direct review. Other types of claims besides ineffective-assistance claims may be just as susceptible to that possibility—for instance, claims that the government suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or legal claims based on newly discovered evidence. Petitioner would thus reduce *Teague* to a var-

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<sup>17</sup> Petitioner relies (Br. 30) on Justice Harlan's reference to a defendant's "fair opportunity to raise his arguments" in *Mackey*. 401 U.S. at 684. But the passage on which petitioner relies concerned only the historical scope of habeas corpus, under which "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original criminal proceeding." *Ibid*.

iant of the procedural-default doctrine, permitting retroactive application of a new rule on collateral review if the defendant demonstrates a reasonable basis for failing to raise the claim seeking a new rule on direct appeal.

That regime is directly contrary to *Teague*'s holding that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." 489 U.S. at 316. *Teague* reflects a judgment that for all prisoners, the purposes of federal collateral review are fully served if the prisoner has a full opportunity to challenge his conviction based on the law that existed at the time the conviction became final, unless an exception applies. *Mackey*, 401 U.S. at 687; *Teague*, 489 U.S. at 306. For all prisoners, moreover, once the conviction has become final, the government's interest in finality outweighs any interest in "continually litigat[ing] the current constitutional validity of the basis for" the conviction, regardless of the ground for the challenge. *Mackey*, 401 U.S. at 689.

Indeed, the Court has indicated that *Teague* applies regardless of whether a defendant might be able to demonstrate an external cause justifying his failure to raise the claim earlier. In *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam), the Court held that the defendant had procedurally defaulted his claim by failing to raise it in state court. The Court rejected the defendant's argument that he should be excused for failing to develop the factual basis of his claim in state court because "his Vienna Convention claims were so novel that he could not have discovered them any earlier." *Id.* at

377. "Assuming that were true," the Court stated, "such novel claims would be barred on habeas review under *Teague*." *Ibid.*; cf. *Zant*, 499 U.S. at 495 ("Application of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force of *Teague v. Lane*, \* \* \* which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas."); *Lambrix*, 520 U.S. at 525, 528-529 (applying *Teague* without deciding whether the claim was procedurally defaulted, despite acknowledging that the prisoner's grounds for not raising the claim earlier "seem to us insubstantial but may not be so").

c. Petitioner also contends (Br. 31-32) that ineffective-assistance claims should be exempt from any *Teague* bar because the *Strickland* inquiry is "expressly designed" to protect finality. To be sure, the prejudice requirement serves finality interests, *Hill*, 474 U.S. at 58, by ensuring that attorney errors that did not affect the outcome of the proceeding do not serve as a basis for overturning a conviction. But the prejudice prong does not address the interest in ensuring that final convictions are not perpetually subject to challenge based on new rules. It focuses solely on whether the attorney's errors may have affected the outcome of the proceeding, *id.* at 58-59, and thus provides no basis for distinguishing between attorney conduct that is deficient under the law existing during direct review proceedings and attorney conduct that is deficient under an extension of Sixth Amendment doctrine announced after the conviction became final.

d. Finally, petitioner contends (Br. 34-39) that applying *Teague* to ineffective-assistance claims would force federal defendants to bring all ineffective-assistance claims on direct review, thereby returning to the ineffi-



cient system disapproved in *Massaro*. But typical ineffective-assistance claims rely on the established scope of the Sixth Amendment and simply seek application of the *Strickland* standard. See Pet. App. 15a-16a; *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment). Given that principle, the vast majority of *Strickland* claims plainly will not implicate the *Teague* rule, and federal defendants will continue to assert them for the first time on collateral review. In the highly unusual circumstance in which a defendant wishes to assert an ineffective-assistance claim that requires extending Sixth Amendment rights to create a new rule, the defendant may raise that claim on direct review. See *Massaro*, 538 U.S. at 508; pp. 49-50, *supra*. *Massaro*'s concern about the inefficiencies created when defendants are effectively required to bring *all* ineffective-assistance claims on direct appeal, 538 U.S. at 507, is not implicated by the limited use of direct appeal to raise the exceptional ineffective-assistance claim that would rely on a new rule.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.

*Solicitor General*

LANNY A. BREUER

*Assistant Attorney General*

MICHAEL R. DREEBEN

*Deputy Solicitor General*

GINGER ANDERS

*Assistant to the Solicitor  
General*

JOEL M. GERSHOWITZ

*Attorney*

SEPTEMBER 2012

# **REPLY BRIEF**

OCT 15 2012

THE CLERK

IN THE  
**Supreme Court of the United States**

ROSELVA CHAIDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On a Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

**REPLY BRIEF FOR PETITIONER**

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Claudia Valenzuela  
Chuck Roth  
Sarah Rose Weinman  
NATIONAL IMMIGRANT JUSTICE  
CENTER  
208 South LaSalle  
Suite 1818  
Chicago, IL 60604

Kevin K. Russell  
GOLDSTEIN &  
RUSSELL, P.C.  
5225 Wisconsin Ave., NW  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
jlfisher@stanford.edu

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

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## REPLY BRIEF FOR PETITIONER

In the years before *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), every lower court to consider the issue had held that misadvising a criminal defendant concerning the deportation consequences of a potential guilty plea constituted ineffective assistance of counsel. See Petr. Br. 26; *infra* at 10-11. Nevertheless, some lower courts erected an artificial barrier to relief in cases where an attorney failed to notify the defendant in any way that a plea might subject her to deportation. In *Padilla*, a seven-Justice majority rebuffed the lower courts' purported distinction, calling it "absurd" to distinguish giving bad advice concerning the deportation consequences of guilty pleas from giving no advice whatsoever. 130 S. Ct. at 1484; see also *id.* at 1487 (Alito, J., concurring in the judgment). As this Court explained, *id.*, it had made clear in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), not only that the Sixth Amendment imposes upon criminal defense lawyers a "dut[y] to consult with the defendant on important decisions" but that there is no difference in this respect between "acts and omissions," *Strickland*, 474 U.S. at 688, 690.

The Government nevertheless argues – relying largely on the lower court decisions that this Court repudiated in *Padilla* – that *Padilla* created a new rule. This argument cannot withstand scrutiny. Each legal principle necessary to hold in *Padilla* that lawyers must give at least some warning that pleading guilty might subject a defendant to deportation was clearly established in this Court's precedent long before *Padilla* was decided.

But even if *Padilla's* holding were somehow new, it still would be improper to refuse to apply it here. *Strickland* and *Padilla* already account for the finality interests at stake in cases such as this one. And introducing the retroactivity framework of *Teague v. Lane*, 489 U.S. 288 (1989), into the realm of federal prisoners seeking relief in first federal habeas motions would wreak havoc on criminal appellate procedure. While the Government halfheartedly attempts to shrug off these consequences, a moment's reflection makes clear that they would be serious and inescapable.

## ARGUMENT

### I. *Padilla* Did Not Announce A New Rule Of Constitutional Law.

The Government does not dispute that prevailing professional norms at the time Chaidez pleaded guilty had long required criminal defense lawyers to advise their clients on the deportation consequences of a conviction. The Government nevertheless contends, for three reasons, that *Padilla's* holding that the Sixth Amendment requires such advice announced a new rule of constitutional law. First, the Government notes that professional norms are "only guides" to attorney obligations under the Sixth Amendment. Resp. Br. 30. Second, the Government asserts that the Court considered a serious antecedent argument in *Padilla* concerning "whether the Sixth Amendment extended to advice about removal consequences in the first place." *Id.* at 9. Third (and most fervently), the Government maintains that the *Padilla* opinions and the "pre-*Padilla* legal landscape" in the lower courts suggest

*Padilla* is a new rule because they refused to apply *Strickland* to the failure to advise regarding deportation consequences. *Id.* at 12-24. None of these arguments is persuasive.

**A. It Required No New Rule For *Padilla* To Recognize Failing To Follow The Pertinent Professional Norms Constituted Ineffective Assistance Of Counsel.**

The Government's assertion (Resp. Br. 30) that the obligations announced in *Padilla* were new because "professional guidelines do not define the scope of the Sixth Amendment guarantee" misses the mark. In *Strickland*, this Court held in no uncertain terms that "[t]he *proper measure* of attorney performance" under the Sixth Amendment is "reasonableness under prevailing professional norms." 466 U.S. at 688 (emphasis added). Indeed, because "[the Sixth Amendment] relies on the legal profession's maintenance of standards," *id.* at 688, this Court has never looked to any other metric.

To be sure, this Court has explained that published professional guidelines are not "inexorable commands" and that the ultimate touchstone remains "reasonableness." *Bobby v. Van Hook*, 558 U.S. 13, 17 (2009). This is because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89.



But those realities are of no help to the Government here. When counsel has contravened directly applicable – and widely accepted – professional standards without any plausible strategic justification, this Court has repeatedly held that *Strickland* not only allows, but *dictates*, relief. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court held that it “made no new law” when it applied the *Strickland* formula “to the ABA Standards for Criminal Justice” and found a violation because the lawyer had failed to follow those standards. *Id.* at 522. Similarly, in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court concluded that counsel’s performance violated clearly established law in large part because it flouted the ABA Standards and there was “no reason to think the [relevant] standard impertinent.” *Id.* at 387

This Court simply followed that well-settled approach again in *Padilla*. To use this Court’s words in *Wiggins*: by “highlighting counsel’s duty to [properly advise her client], and in referring to the ABA Standards for Criminal Justice as guides, [the Court] applied the same ‘clearly established’ precedent of *Strickland*” it had applied so often before. 539 U.S. at 522. Indeed, in *Padilla*, this Court pegged its holding not only to ABA Standards but also to numerous other practice guides that, without exception, required criminal defense counsel to give the kind of advice at issue. See 130 S. Ct. at 1482-83; see also Br. of NACDL 6-18 (setting forth the depth and breadth of longstanding professional norms in this area).

**B. *Padilla's* Rejection Of The  
"Antecedent Question" The Kentucky  
Supreme Court Had Invented Made  
No New Law.**

The Government contends that *Padilla* announced a new rule because this Court had not previously "required counsel to advise the defendant about matters that are *not* part of the criminal jeopardy that a defendant faces." Resp. Br. 25. The Government's argument, just like the state's argument to this effect in *Padilla*, ignores the plain meaning of *Strickland*.

1. Ever since this Court decided *Strickland*, it has been clear that the only antecedent question when a court confronts a claim of ineffective assistance is whether the case at issue is a *criminal* one. If so, a court must assess whether the attorney's conduct was reasonable according to prevailing professional norms. *Strickland*, 466 U.S. at 688. The Government's observations (Resp. Br. 26-27) that immigration proceedings are civil in nature are thus entirely irrelevant. *Padilla* was a *criminal* defendant being prosecuted in a *criminal* case. He thus was entitled to effective assistance of counsel in considering whether to plead guilty to those charges.

Notwithstanding that reality, the Supreme Court of Kentucky in *Padilla* had rejected *Padilla's* ineffectiveness claim "on the ground that the advice he sought about the risk of deportation concerned only collateral matters." 130 S. Ct. at 1481. But this Court dismissed that argument as baseless. The Court explained that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally

‘reasonable professional assistance’ required under *Strickland*.” *Id.* Accordingly, the only genuine legal question in *Padilla* was whether reasonableness, measured by professional norms, required criminal defense lawyers to warn their clients of deportation consequences of guilty pleas. *See id.* at 1482. No other inquiry was necessary.

2. Even if a legitimate antecedent question might sometimes exist when advice beyond “criminal jeopardy” is at issue, pre-*Padilla* law dictated that *Strickland* applied at least to advice regarding immigration consequences of criminal convictions. *See* Petr. Br. 20; Br. of NACDL 6-18. That is, far from “view[ing] removal proceedings as entirely separate from a defendant’s criminal jeopardy,” Resp. Br. 26, this Court had recognized long before *Padilla* that the penalty of deportation is “intimately related to the criminal process,” *Padilla*, 130 S. Ct. at 1481.

Nearly a century ago, this Court noted that removal from the United States could result “in loss of both property and life; or of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see also Costello v. INS*, 376 U.S. 120, 128 (1964). (stressing that the “stakes” are “considerable” when deportation is potentially a consequence); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”) (internal quotation marks and citation omitted). This Court thus observed prior to *Padilla* that “competent defense counsel” “would . . . advise[]” clients of possible deportation consequences of their convictions. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2003). Indeed, this Court noted that “remain[ing] in

the United States” is often “*more important* to [a defendant] than any potential jail sentence.” *Id.* at 322 (quotation marks and citation omitted) (emphasis added).

The Government’s only real response to these pre-*Padilla* recognitions is that *St. Cyr* did not hold “that the *Sixth Amendment* imposed a duty on counsel to advise about removal consequences.” Resp. Br. 29 (emphasis in original). But that should not make any difference to the *Teague* inquiry. As Justice Breyer explained in *Tyler v. Cain*, 533 U.S. 656 (2001):

The matter is one of logic. If Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal. It is also a matter of law. If Case One holds that a party’s expectation measures damages for breach of contract and Case Two holds that Circumstances X, Y, and Z create a binding contract, we do not need Case Three to hold that in those same circumstances expectation damages are awarded for breach.

*Id.* at 672-73 (dissenting opinion); *see also id.* at 666 (majority opinion) (agreeing with this logical formula but holding that the “combination of holdings” at issue in that case did not satisfy the formula); *cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-65 (2007) (holding that a combination of prior cases clearly established that habeas petitioner was entitled to relief).

Although the situation here involves a prior holding and empirical recognition (instead of two legal holdings), the syllogism applies just as well in this context. *Strickland* held that the Sixth

Amendment requires effective assistance of counsel, measured by prevailing professional norms. *St. Cyr* (as well as previous cases) recognized that attorneys had an obligation under prevailing professional norms to advise their clients regarding deportation consequences. Together, these precedents dictated the holding in *Padilla*. It is irrelevant that *Padilla* was the first decision to combine these principles to state explicitly that the *Sixth Amendment* requires attorneys to provide advice concerning the deportation consequences of a criminal conviction.

C. Neither The *Padilla* Opinions Nor  
Pre-*Padilla* Lower Court Decisions  
Indicate That *Padilla* Announced A  
New Rule.

The Government does not dispute that the test for determining whether a holding was dictated by precedent is an “objective” one that depends not on the existence of any divergent judicial votes but rather on whether those contrary views were reasonable. See Petr. Br. 15, 24. The Government nevertheless argues that the “*Padilla* opinions” and “pre-*Padilla* legal landscape” in the lower courts indicate that the decision announced a new rule. See Resp. Br. 12-24. These arguments are unconvincing.

1. The *Padilla* opinions largely speak for themselves.

a. *Majority opinion.* The Government asserts that *Padilla* announced a new rule because the Court “did not purport to rely upon any controlling precedent.” Resp. Br. 18. But the Government ignores what this Court wrote: “[L]ongstanding Sixth Amendment precedents . . . demand[ed]” the outcome *Padilla*



reached. 130 S. Ct. at 1486. The Government also contends that *Padilla* announced a new rule because the Court noted that it should use caution in “recognizing new grounds for attacking the validity of guilty pleas.” *Id.* at 1485; *see also* Resp. Br. 20. In referencing “new grounds,” however, the Court was referring simply to new *applications* of *Strickland* – not suggesting that it was minting any new constitutional rule. *See Padilla*, 130 S. Ct. at 1485; *see also Wiggins*, 539 U.S. at 522 (applying *Strickland* in new settings does not create new rules).

b. *Concurring opinion.* The Government does not dispute that petitioner “would have prevailed under the test advocated by the concurring Justices” (Resp. Br. 22) – namely that competent counsel must, at the very least, “advise the defendant that a criminal conviction may have adverse immigration consequences.” *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in the judgment). Strictly speaking, then, this Court need only determine here whether *that* standard announced a new rule.

The Government asserts that the concurrence’s standard would “likely have been a new rule itself, as the concurring Justices did not suggest that it was ‘dictated’ by any of the Court’s prior decisions.” Resp. Br. at 23. On the contrary, the opening sentence of the concurrence makes clear that defense counsel “fails to provide effective assistance *within the meaning of Strickland* if the attorney misleads a noncitizen client regarding the removal consequences of a conviction.” *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring in the judgment) (emphasis added) (internal citations omitted). And as the concurrence explained, a lawyer misleads her noncitizen client

whenever she “provid[es] incorrect advice” or fails to “advise the defendant that a criminal conviction may have adverse immigration consequences.” *Id.*

c. *Dissenting opinion.* The Government also contends that *Padilla* announced a new rule because the dissenting Justices characterized *Padilla* as holding that the Sixth Amendment “extend[s] beyond defense against the prosecution.” Resp. Br. 23 (quoting *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting)). But this mischaracterizes *Padilla*’s holding. The Court held that an important *part* of defending against the prosecution includes advising a client that conviction may trigger deportation – not that the Sixth Amendment requires something more than such a defense.

In short, as petitioner described in her opening brief, the dissent in *Padilla* was not resisting an expansion of *Strickland*; it was advocating a limitation on *Strickland*. See Petr. Br. 23-24. The majority’s rejection of that argument did not create any new constitutional rule; it merely held the line.

2. Nor did the pre-*Padilla* legal landscape in the lower courts render *Padilla*’s holding a new rule. The Government relies on various pre-*Padilla* cases holding that *Strickland* was not violated when attorneys failed to warn their clients that pleading guilty would subject them to deportation. Resp. Br. 13-15. But even if lower court case law were relevant to *Teague*’s objective inquiry, these cases cannot obscure the fact that lower courts recognized well before *Padilla* that *Strickland* actually *did* apply to advice concerning deportation consequences. In fact, every state and federal appellate court to confront the issue before *Padilla* held that attorneys violated

*Strickland* when they misadvised their clients concerning such consequences. See Petr. Br. 25-26 (citing federal appellate cases); see also *Rubio v. State*, 194 P.3d 1224, 1230-32 (Nev. 2008); *State v. Rojas-Martinez*, 125 P.3d 930, 934-35 (Utah 2005); *Alguno v. State*, 892 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 2005); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *People v. McDonald*, 802 N.E.2d 131, 134-35 (N.Y. 2003); *In re Yim*, 989 P.2d 512, 516 (Wash. 1999); *State v. Garcia*, 727 A.2d 97, 100-01 (N.J. Super Ct. App. Div. 1999); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *People v. Correa*, 485 N.E.2d 307, 310-12 (Ill. 1985).

The Government attempts to brush aside these cases “on the ground that all criminal defense attorneys have a duty not to misrepresent the extent of their expertise about *any* topic.” Resp. Br. 17 (emphasis added). But that is not how these courts generally explained their rulings. Rather, citing *St. Cyr* and earlier cases that recognized the severity of deportation, the lower courts grounded their insistence that attorneys give accurate advice on the fact that deportation is such a “harsh consequence[]” that a client’s misunderstanding of the potential for deportation “may have [a] significant impact on a client’s decisions concerning plea negotiations.” *People v. Pozo*, 746 P.2d 523, 528-29 (Colo. 1987); see also *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985) (deportation is “so important that misinformation from counsel may render the guilty plea constitutionally uninformed”); *Rubio v. State*, 194 P.3d 1224, 1230 (Nev. 2008) (relying on the “harshness of deportation”); *State v. Rojas-Martinez*, 125 P.3d 930, 934-35 (Utah 2005) (relying on the “gravity of the consequences of deportation”);

*People v. Correa*, 485 N.E.2d 307, 311 (Ill. 1985) (deportation is a “drastic consequence” – “more severe than the penalty imposed by the court”).

In light of this recognition concerning the importance of deportation to a client’s decision whether to plead guilty, lower courts simply had no warrant to distinguish misadvice in this setting from failing to give any advice at all. *Strickland* imposed upon counsel a “dut[y] to consult with the defendant on important decisions.” 466 U.S. at 688. And it expressly refused to distinguish between “acts or omissions.” *Id.* at 690. Accordingly, it required no new law for this Court to abrogate the decisions that the Government extols as reasonable. In the words of *Padilla*, the distinction those decisions drew was “absurd” – indeed, “fundamentally at odds with the obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’” *Padilla*, 130 S. Ct. at 1484 (quoting *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)).<sup>1</sup>

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<sup>1</sup> Several states as amici argue that deeming *Padilla* an old rule would burden them with having to reopen numerous cases that became final before *Padilla* was decided. *See* Br. of New Jersey et al. 1. But this argument ignores the states’ overwhelming acknowledgement prior to *Padilla* that it constituted ineffective assistance to misadvise a client regarding deportation consequences of a plea. *See supra* at 10-11. It also overlooks many states’ longstanding statutory requirements before that decision “that trial judges advise defendants that immigration consequences may result from accepting a plea agreement.” *St. Cyr*, 533 U.S. at 322 n.48. Indeed, if anything, a holding that *Padilla* does *not* apply retroactively would burden states more than the converse, for it would require them to deal with the “devastating” consequences of a greater number of

## II. Even If *Padilla* Were A New Rule, It Would Apply To A Federal Defendant Seeking Its Benefit In Her First Post-Conviction Filing.

The Government advances two objections against petitioner's argument that *Teague's* retroactivity framework does not apply to a federal defendant making an ineffective assistance claim in a first post-conviction filing. First, the Government suggests that this argument is not properly before the Court. Second, the Government argues that *Teague* should apply not only as a general matter to federal convictions but also specifically to ineffective-assistance claims raised for the first time on collateral review. Each of these arguments is misguided.

### A. The Argument That *Teague* Is Inapplicable Is Properly Before This Court.

It is well settled that a petitioner may advance any argument that is "fairly included" in the claim that the question presented brings before this Court. See S. Ct. R. 14(1)(a); *Gross v. FBL Fin. Svcs.*, 557 U.S. 167, 173 & n.1 (2009). That is, "[o]nce a claim is properly presented . . . parties are not limited to the precise arguments they made below." *Harris Trust &*

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deportations – for example, more single-parent households, the children of which face "significantly increased risks of incarceration and illegal behavior." See Br. of Active and Former State and Federal Prosecutors 16-22.



*Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

The Government does not dispute that the argument that *Teague*'s retroactivity framework is inapplicable to petitioner's case is fairly included in her question presented: "[w]hether the principle articulated in *Padilla* applies to persons whose convictions became final before its announcement." Pet. i. Nevertheless, citing its own reframing of the question presented, which asks only whether *Padilla* constitutes a "new rule" under *Teague*, the Government asserts that petitioner's "challenge to the applicability of the *Teague* framework is not properly before the Court." Resp. Br. 36 (citing BIO 10 n.2); *see also id.* at I.

The Government's assertion ignores a fundamental rule of practice in this Court: When, as here, the Court grants a writ of certiorari without further comment, the petitioner's formulation of the question presented – not any formulation that the respondent chooses to advance – controls. *See Yee*, 503 U.S. at 535. Petitioner thus may argue here that *Teague*'s "new rule" framework is inapplicable.

Even if it were necessary for petitioner to have expressly preserved this specific argument, she did so both in the court of appeals and during the certiorari proceedings in this Court. First, petitioner argued in her petition for rehearing en banc that *Teague*'s retroactivity framework should not apply to her case. Citing *Logan v. Wilkins*, 644 F.3d 577 (7th Cir. 2011), the Government contends that this argument came too late. Resp. Br. 36 n.12. But *Logan* merely states the familiar principle that a party that fails to raise

an argument in its initial brief to an appellate panel has generally waived the right to raise that argument later. *Id.* at 583. That principle is inapposite when binding circuit precedent makes raising an argument before an appellate panel, rather than to the full court, futile. *See, e.g., United States v. Kasvin*, 757 F.2d 887, 891 (7th Cir. 1985); Pet. Reply at Cert. 2 n.1.

Second, petitioner noted during the certiorari stage of proceedings before this Court that she intended to argue that *Teague* should not apply to her case. In its acquiescence to certiorari, the Government claimed – as it does now – that petitioner “does not challenge *Teague*’s applicability in this case.” U.S. Br. at Cert. 10-11 n.2. Petitioner responded by clarifying that “[t]he question whether *Teague*’s framework applies when a person challenges a *federal* conviction based on ineffective assistance of counsel is fairly included within the question presented.” Pet. Reply at Cert. 2 n.1. In order to be absolutely clear, petitioner added: “holding that a less restrictive retroactivity regime governs in this setting would be one way of resolving the circuit split at issue.” *Id.* The Government now turns a deaf ear to this exchange, but it cannot erase its occurrence or the notice it provided.

#### **B. Applying *Teague* In This Context Would Be Theoretically And Practically Untenable.**

The Government spills much ink arguing as a general matter that, even though this Court has repeatedly insisted that the *Teague* framework is designed to serve comity interests, that framework should nonetheless apply to federal convictions.

While this Court could reject that argument *in toto*, it need not address that general issue here. This Court need only recognize that *Teague* does not apply in the specific context in which a federal defendant challenges her conviction on ineffective-assistance grounds in her first post-conviction filing.

When the Government finally addresses that narrower issue, it suggests that *Teague* should apply as a theoretical matter and that the practical problems such a holding would raise are manageable. The Government is mistaken on both counts.

1. *Theory*. The Government recognizes that it was procedurally proper for Chaidez to raise her ineffective-assistance claim for the first time on collateral review. Resp. Br. 4. And the Government does not dispute – nor could it – that where a collateral proceeding is the first opportunity for a prisoner to raise a claim of ineffective assistance at trial, “the collateral proceeding is in many ways the equivalent of a [defendant’s] direct appeal as to the ineffective-assistance claim.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). The Government nevertheless argues that *Teague* should apply to petitioner’s ineffective-assistance-of-counsel claims for two reasons. Neither is persuasive.

a. Although the Government acknowledges that *Strickland* and *Padilla* expressly account for society’s interest in the finality of criminal convictions, it argues that the finality interest that *Teague* protects is somehow different. Resp. Br. 52. The Government’s hairsplitting eludes petitioner; no one has ever previously claimed that finality is anything other than an indivisible interest in repose. But even if there were more than one kind of finality,

*Strickland* and *Teague* undeniably accommodate the same interest. *Teague*, as the Government notes, “ensur[es] that final convictions are not perpetually subject to challenge” based on new developments in the law. *Id.* Similarly, *Strickland* protects the “fundamental interest in the finality of [convictions]” by limiting the circumstances in which “new grounds for setting aside guilty pleas are approved,” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (internal quotation marks and citations omitted); see also Petr. Br. 31-33 (noting similar language in *Strickland* and *Padilla*). This Court’s ineffective-assistance jurisprudence, therefore, fully respects the only governmental interest even arguably at stake here.

b. Second, the Government claims that petitioner “overlooks *Teague*’s judgment that retroactivity principles should not vary based on the characteristics of the particular rule at issue.” Resp. Br. 45. But there are already two situations in which *Teague* does not apply, each of which depends on the characteristics of the particular rule at issue. *Teague*’s bar does not apply (1) “to rules forbidding punishment of certain primary conduct” or (2) to “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Beard v. Banks*, 542 U.S. 406, 416-17 (2004) (internal quotation marks and citations omitted).

There is nothing problematic about recognizing that *Teague* similarly does not apply to federal defendants raising ineffective-assistance claims in initial post-conviction filings. This Court has already held that the procedural default doctrine does not apply in this context. See *Massaro v. United States*,

538 U.S. 500 (2003). And as the Government itself explained in that case, a “bright-line rule” deeming these claims beyond the scope of a bar against habeas relief is “straightforward to administer.” U.S. Br. 15, *Massaro v. United States*, 538 U.S. 500 (2003). Indeed, such a rule would involve a far less fact-intensive inquiry than enforcing the two other rules deeming certain kinds of claims outside the boundaries of *Teague*. See, e.g., *Bousley v. United States*, 523 U.S. 614 (1998) (primary conduct); *Shriro v. Summerlin*, 542 U.S. 348 (2004) (watershed rule).

2. *Practice.* Applying *Teague* to federal defendants’ ineffective-assistance claims raised at the first opportunity on collateral review would not only be theoretically unjustified, but also practically disastrous. The Government acknowledges that applying *Teague* to federal defendants raising ineffective-assistance claims would compel at least some of them to raise these claims on direct review. Resp. Br. 53. Yet the Government asserts for two reasons that this development would not create significant problems. First, it argues that the “vast majority of *Strickland* claims plainly will not implicate the *Teague* rule.” *Id.* Second, the Government suggests that when defendants raise ineffective-assistance on direct review, appeals can be stayed while the case is remanded to the trial court for fact-finding as necessary to resolve the claim. *Id.* at 50. Neither of these suggestions comes to grips with reality.

a. It is immaterial whether or not ineffective-assistance claims “typical[ly]” require a court to announce and apply a new rule. *Id.* at 53. If this Court holds that *Teague*’s framework applies to such



claims, ethical criminal defense attorneys will – “to avoid procedural or substantive bars, criticism, or even disciplinary charges” – feel compelled to “raise ineffective-assistance claims on direct review.” Br. of Nat’l Ass’n of Fed. Defenders 8-9. There is no other course for these attorneys to pursue: Given that the Government presumably will raise *Teague* on collateral review whenever it is plausibly implicated – and that, even if the Government fails to raise *Teague*’s bar, a federal court may do so *sua sponte*, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) – attorneys simply will not be able to run the risk that *Teague* might later prevent their clients from obtaining relief. Thus, holding that *Teague* applies in this context would steer virtually all of the ineffective-assistance litigation that currently occurs on collateral review into direct review.

b. The Government’s second contention – that when defendants press ineffective-assistance claims on direct review, courts of appeals can simply stay proceedings and remand those claims for further factual development – is untenable.

As an initial matter, the Government’s proposed stay-and-remand procedure would severely undercut its own asserted interest in the finality of criminal convictions. As the Government itself explained in *Massaro*, staying and remanding appeals “delay[s] imposition of a final judgment” and thus has “the effect of undermining AEDPA’s strict limitations on the filing of successive [post-conviction] motions.” See U.S. Br. at 30 n.14, *Massaro v. United States*, 538 U.S. 500 (2003) (No. 01-1559). In a case in which a defendant appeals multiple claims, only one of which relates to ineffective assistance of counsel,

proceedings on all the remaining claims would have to be stayed if the ineffective-assistance issue were remanded. Resolution of that issue – and thus the defendant’s entire direct appeal – would take several extra months and sometimes even years. See Br. of Nat’l Ass’n of Fed. Defenders 12.

The Government offers no explanation why it now advocates the very procedure it condemned in *Massaro*. Instead, it simply cites two post-*Massaro* cases that supposedly stand for the proposition that courts of appeals may stay and remand cases in order to develop and decide ineffective assistance claims on direct review. Resp. Br. 50 (citing *United States v. Burroughs*, 613 F.3d 233 (D.C. Cir. 2010), and *United States v. Hasan*, 586 F.3d 161 (2d Cir. 2009)). But neither case involved such a remand. In each instance, the court of appeals merely cited in passing one of the very decisions the Government criticized in *Massaro*, see U.S. Br. at 30 n.14, stating that such remands are theoretically available. See *Burroughs*, 613 F.3d at 238 (citing *United States v. Geraldo*, 271 F.3d 1112, 1115-16 (D.C. Cir. 2001)); *Hasan*, 586 F.3d at 170 (citing *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000)).<sup>2</sup> The fact that the Government

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<sup>2</sup> In *Burroughs*, the D.C. Circuit rejected the defendants’ ineffective-assistance claim on the ground that the facts alleged, even if true, would not make out a constitutional violation. 613 F.3d at 239. In *Hasan*, the Second Circuit “decline[d] to hear” the defendant’s potentially meritorious claim because “the record on appeal [did] not include facts necessary to adjudicate a claim of ineffective assistance of counsel.” 586 F.3d at 171 (internal quotation marks and citation omitted). The court explained that it was following its “usual practice” of refusing to consider such a claim on direct appeal, instead “leav[ing] it to

cannot cite (and petitioner's own research has not revealed) a single case in the decade since *Massaro* in which a remand has occurred speaks volumes about the degree to which the Government's proposal here would upend current practice.

Even if this Court were willing to accept the substantial delays that the Government's proposed stay-and-remand procedure would generate, the procedure would still be unworkable. Whenever a defendant raised a potentially meritorious ineffective-assistance-of-counsel claim, the court of appeals would need to determine whether it implicated *Teague*. If so, then the court would need to hear the claim on direct review. See Petr. Br. 36; Resp. Br. 53. But a court generally cannot know exactly what a defendant's legal claim is until the underlying facts are discerned. Such factual development would necessitate a remand. In other words, the Government tries to solve one Catch-22 (see Petr. Br. 38 & n.8) by introducing another one into its proposed framework for adjudicating federal prisoners' ineffective-assistance claims: It asks the court of appeals to resolve a threshold question to determine whether the case requires a remand, but that question will generally be unanswerable until a remand has occurred.

Finally, even if the Government's stay-and-remand proposal were respectful of finality interests and were procedurally coherent, its proposal would *still* provide no answer to the slew of other practical

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the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255." *Id.*

problems that the National Association of Federal Defenders and petitioner have outlined. See Br. of Nat'l Ass'n of Fed. Defenders 8-18; Petr. Br. 34-39. Given the importance of these matters, petitioner briefly highlights them here.

First of all, the Government's proposal does not even begin to address a large category of criminal cases: those that end in guilty pleas with appeal waivers. See Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 150-151 (2003) (noting that "many – if not most" guilty pleas include such waivers). When defendants agree to waive their right to appeal, they must, by definition, raise any challenges to the conviction in collateral proceedings. If *Teague* applies to ineffective-assistance claims raised in these circumstances, then such defendants who plead guilty and waive their rights to appeal would *never* have any opportunity to ask courts to announce and apply new ineffective-assistance rules to their cases.

Even where defendants retain the right to appeal their convictions and take such appeals, significant complications will inevitably arise. In such circumstances, when (as is often the case) trial counsel continues as appellate counsel, it is unreasonable to expect that lawyer to be aware of, let alone challenge, his own effectiveness. See Br. of Nat'l Ass'n of Fed. Defenders 15-16. Worse yet, applying *Teague* here would yield intractable conflicts of interest for federal public defenders. In any case where "the constitutional adequacy of the assistance provided by one of [a Federal Defender] Office's [trial] lawyers is called into question, and as a practical matter must be raised on direct review,"

the Office would be unlikely to be able to retain the appeal of a case. *Id.* at 18. The withdrawal of trial counsel from appellate proceedings due to such conflicts of interest would impair clients' prospects on appeal. Given that the Federal Defender Offices represent roughly thirty percent of federal felony defendants each year, this potential problem is a profound one.

Even when trial counsel are not conflicted out of appellate proceedings, requiring appellate counsel to raise ineffective-assistance claims on direct review will also hinder working relationships between trial and appellate counsel. As this Court noted in *Massaro*: "Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." 538 U.S. at 506. Without a good working relationship with trial counsel, appellate counsel will be less proficient at representing their clients, and meritorious claims of ineffective assistance of counsel are more likely to fail.<sup>3</sup>

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<sup>3</sup> The Criminal Justice Legal Foundation suggests, as an alternative to the Government's stay-and-remand proposal, that ineffective-assistance claims that require evidentiary development and require a court to announce and apply a new rule "can be made in a § 2255 motion brought before the case becomes final on direct appeal." Br. of CJLF 25. But this approach is at best equivalent to the Government's proposal: in order to forestall finality while the ineffective-assistance claim is litigated, appellate proceedings would have to be stayed, just as under the Government's approach, until the ineffective-



Given these unavoidable and intractable administrative problems, the *Teague* doctrine should not apply where federal defendants bring ineffective-assistance claims in first post-conviction proceedings. To hold otherwise would be to recognize federal defendants' constitutional right to effective assistance in principle but largely to withhold that protection in fact.

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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assistance claim is adjudicated in the district court (and perhaps on appeal as well). Moreover, CJLF's proposal does nothing to resolve the conflict-of-interest problems inherent in litigating ineffective-assistance claims on direct review.

Respectfully submitted,

Gerardo S. Gutierrez  
53 W. Jackson Boulevard  
Suite 1651  
Chicago, IL 60604

Claudia Valenzuela  
Chuck Roth  
Sarah Rose Weinman  
NATIONAL IMMIGRANT  
JUSTICE CENTER  
208 South LaSalle  
Suite 1818  
Chicago, IL 60604

Kevin K. Russell  
GOLDSTEIN & RUSSELL,  
P.C.  
5225 Wisconsin Ave., NW  
Suite 404  
Washington, DC 20015

Jeffrey L. Fisher  
*Counsel of Record*  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT  
LITIGATION CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 724-7081  
*jlfisher@stanford.edu*

Valerie Marsh  
Kathleen Sanderson  
Angela Vigil  
BAKER & MCKENZIE LLP  
1111 Brickell Avenue  
Suite 1700  
Miami, FL 33131

October 15, 2012

**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

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ROSELVA CHAIDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Seventh Circuit**

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**BRIEF FOR ACTIVE AND FORMER STATE AND  
FEDERAL PROSECUTORS AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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HEIDI ALTMAN

*Counsel of Record*

CENTER FOR APPLIED LEGAL STUDIES

GEORGETOWN LAW SCHOOL

600 New Jersey Avenue NW, Suite 332

Washington, DC 20001

(202) 662-9571

hra8@law.georgetown.edu

MICHAEL K. GOTTLIEB

ORRICK, HERRINGTON & SUTCLIFFE LLP

1152 15th Street, NW

Washington, DC 20005

(202) 339-8400

*Counsel for Amici Curiae*

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are active and former prosecutors. They include District Attorney Craig Watkins of Dallas County, Texas and District Attorney Jeffrey Rosen of Santa Clara County, California, as well as former District Attorneys, County Attorneys, State Attorneys, Attorneys General, United States Attorneys, and a former President of the National District Attorneys Association. *Amici* have served in state and federal jurisdictions throughout Arizona, California, Connecticut, Florida, Illinois, Maryland, Minnesota, Nevada, New Jersey, New York, Tennessee, Texas, and Wisconsin. Many have devoted decades of service to their local and federal governments. The names, titles, and years of service of these *amici* are listed in Appendix A.

*Amici*'s interests are driven by the fundamental responsibilities of the government prosecutor to pursue justice and serve as a steward of the state and community. See, e.g., *ABA Standards for Criminal Justice Prosecution Function* § 3-1.2(c) (1993). These responsibilities are often implicated when a criminal conviction results in unintended immigration penalties, as such penalties weigh heavily in the determination of the proportionality and fairness of a case

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<sup>1</sup> Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

disposition. Further, a defendant's deportation may negatively impact innocent members of the communities prosecutors are duty bound to serve and protect. In *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010), this Court recognized that the consideration of immigration penalties in the plea bargaining phase of a case is often in the State's best interests. That is equally true in the post-conviction phase of a case. Because of the unique State interests raised by some *Padilla*-based claims, *amici* believe that the exercise of prosecutorial discretion in such cases is vital to the State's ability to pursue justice. *Amici* are concerned that the Court's decision in this case could curtail that discretion simply on the basis of the date the underlying conviction was secured.

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## SUMMARY OF ARGUMENT

*Amici*, active and former state and federal prosecutors, argue that the retroactive application of this Court's decision in *Padilla v. Kentucky* is necessary to safeguard vital State interests.

Deportation following a criminal conviction has ripple effects that prosecutors must consider in order to best serve the interests of the State. Often, a prosecutor first learns that a conviction will trigger deportation when a post-conviction claim of ineffective assistance of counsel is brought pursuant to *Padilla v. Kentucky*. In some such cases, the prosecutor will contest the motion, believing the original case



disposition to be fair. In other cases, the prosecutor will determine in her discretion that justice demands engaging with the defense to pursue an adjusted disposition that mitigates the attendant immigration penalties. The prosecutor may choose to exercise her discretion in this way because she believes the original disposition and consequent immigration penalties are not proportionate to the underlying offense. Or she may find that the defendant's deportation will leave innocent members of the community, such as the defendant's children or a crime victim, at risk.

A finding of non-retroactivity in this case would significantly restrict prosecutors' discretion to make meaningful choices in post-conviction litigation challenging convictions obtained before the date of the decision in *Padilla v. Kentucky*. *Amici* argue that this restriction would preclude a just outcome in many cases. In fact, a post-conviction claim challenging an older conviction is often the most deserving of an exercise of prosecutorial discretion, as the defendant may have deepened her community ties in the years subsequent to the conviction. The presence of children born in the United States in the years following a conviction, for example, may render deportation a disproportionate penalty for a relatively minor crime.

Although all post-conviction motions raise concerns regarding the finality of convictions, these concerns are outweighed by the State interests at play when deportation is an unintended consequence of a criminal conviction. Furthermore, the finality

concerns raised by this case are mitigated by the barriers to relief in claims brought pursuant to *Padilla v. Kentucky*, barriers that will remain in place regardless of the outcome in this matter.<sup>2</sup>

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## ARGUMENT

### I. A FINDING OF NON-RETROACTIVITY WILL COMPROMISE PROSECUTORS' DISCRETION TO PROTECT STATE INTERESTS IMPLICATED BY IMMIGRATION PENALTIES OF CONVICTIONS

When a defendant asserts a post-conviction claim of ineffective assistance of counsel, the prosecutor must use her discretion to determine how to respond, guided by the long-standing prosecutorial responsibility to pursue justice. This responsibility demands heightened attention in the case of post-conviction motions brought pursuant to *Padilla v. Kentucky*. Unintended immigration penalties resulting from a conviction may implicate the State's interests in justice and proportionality, in addition to the well-being of community members and victims of crime. This Court acknowledged these interests in *Padilla v. Kentucky* with regard to the plea bargaining phase of a case, encouraging the "informed consideration" of

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<sup>2</sup> See *infra* Section II.A for an explication of these procedural, jurisdictional, and substantive obstacles to relief.

immigration penalties so that “the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” *Padilla*, 130 S. Ct. at 1486. *Amici* contend that the interests of both parties continue to demand the consideration of immigration penalties during the post-conviction phase of a case. Should the Court rule against the retroactive application of *Padilla v. Kentucky*, however, prosecutors’ ability to exercise their own careful judgment in this post-conviction phase will be severely compromised.

**A. A finding of non-retroactivity will effectively strip many prosecutors of the ability to reach negotiated settlements with the defense in claims brought pursuant to *Padilla v. Kentucky***

Ordinarily, the defense begins the process of seeking to adjust a conviction by filing a motion with the court that adjudicated the original conviction.<sup>3</sup> A

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<sup>3</sup> The procedural vehicle by which a post-conviction motion will ordinarily be brought pursuant to *Padilla v. Kentucky* varies by jurisdiction. See, e.g., *Ex parte Olvera*, No. 05-11-01349-CR, 2012 WL 2336240, at \*1 (Tex. App. June 20, 2012) (finding jurisdiction over a *Padilla*-based claim of ineffective assistance of counsel raised by application for writ of habeas corpus); *Campos v. State*, No. A10-1395, 2012 WL 2327962, at \*2-3 (Minn. June 20, 2012) (reviewing a *Padilla*-based claim of ineffective assistance of counsel brought under Minn. Stat. Ann. § 15.05(1) (2010), which allows for the withdrawal of a guilty plea upon a timely motion to correct a manifest injustice).

post-conviction motion brought pursuant to *Padilla v. Kentucky* will often inform the prosecutor for the first time that a conviction triggers immigration penalties for a particular defendant. This is in large part because it is the responsibility of the defense attorney to inquire as to her client's immigration status and such inquiries would be inappropriate on the part of the prosecutor. See *National Legal Aid and Defender Ass'n Performance Guidelines for Criminal Defense Representation* § 2.2(b)(2)(A) (1995).

The prosecutor may respond to this motion in a variety of ways. Preliminarily, she may choose to contest the motion, join in the motion, or take no position. Then, should the motion succeed, she may seek to have the original charges dismissed, engage in renewed plea negotiations with the defense, or mount a new prosecution at trial. In motions brought pursuant to *Padilla v. Kentucky*, the defense will often seek an adjusted plea settlement that is similar in nature and severity to the original conviction but does not trigger immigration penalties. As this Court noted in *Padilla v. Kentucky*, "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction." 130 S. Ct. at 1486.<sup>4</sup>

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<sup>4</sup> Cf. *Kawashima v. Holder*, 132 S. Ct. 1166, 1180 (2012) (Ginsburg, J., dissenting) (discussing common plea agreements on tax-related charges between federal prosecutors and non-citizen defendants seeking to avoid deportation).

As in the pretrial and trial phase of a case, the prosecutor's actions in response to a post-conviction motion are guided by her ethical obligation to pursue justice. See Fred Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 Vand. L. Rev. 171, 181 (2005). For more than a century, the American legal system has tasked the prosecutor with pursuing justice for the defendant and the community.<sup>5</sup> This understanding of the prosecutor's role as unique from other advocates is common among ethical standards guiding prosecutors. See *Model Rules of Prof'l Conduct* R. 3.8 cmt. (2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *ABA Standards for*

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<sup>5</sup> The consensus among scholars is that the understanding of the American prosecutor's unique obligation to pursue justice dates back to an essay published by the judge and scholar George Sharswood in 1854. See George Sharswood, *An Essay on Professional Ethics* 94 (Fred B. Rothman & Co. 1993) (1854), as discussed in, for example, Bruce A. Green, *Why Should Prosecutors 'Seek Justice'?*, 26 Fordham Urb. L.J. 607, 612 (1999); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 39 n.10 (2009); Jane Campbell Moriarty, *'Misconvictions,' Science, and the Minister of Justice*, 86 Neb. L. Rev. 1, 21-22 (2008). In 1935, this Court embraced Mr. Sharswood's description of the prosecutor as a minister of justice, stating: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).



*Criminal Justice Prosecution Function* § 3-1.2(c) (1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); *National District Attorneys Association National Prosecution Standards* § 1-1.2 cmt. (2009) (“A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole.”).

In the context of a *Padilla v. Kentucky* claim, the prosecutor’s obligation to pursue justice demands a heightened weighing of concerns relating to proportionality and community and victim safety. These interests are explored in detail in Section I.B, *infra*. In the experience and belief of *amici*, some *Padilla*-based claims implicate State interests so significantly that it is in the State’s best interest to consent to the requested relief and reach a negotiated post-conviction settlement with the defense. *See infra* Section I.B (discussing two recent post-conviction claims brought pursuant to *Padilla v. Kentucky* in which *amici* Dallas County, Texas District Attorney Craig Watkins and Santa Clara County, California District Attorney Jeffrey Rosen exercised their discretion to consent to relief because of serious concerns regarding proportionality and the well-being of community members).

A finding by this Court that *Padilla v. Kentucky* does not have retroactive application, however, will significantly curtail the ability of prosecutors across the country to exercise such discretion in claims brought concerning convictions secured before March 31, 2010. This Court has held that the non-retroactivity

rule established in *Teague v. Lane*, 489 U.S. 288, 310 (1989) is a “threshold question” that courts may raise sua sponte, even if the State waives or forfeits application of the rule. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1984).<sup>6</sup> Therefore, even if some prosecuting attorneys attempt to waive *Teague* in the event of a finding of non-retroactivity in this matter,<sup>7</sup> such waiver will be rendered meaningless where lower courts nonetheless elect to apply *Teague* and bar relief. Should this Court make a finding of non-retroactivity in this case, many lower courts may consider the non-retroactivity principle sua sponte as a matter of deference, particularly in jurisdictions where *Teague’s* non-retroactivity rule is applied.<sup>8</sup>

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<sup>6</sup> Many lower courts have taken the Court up on its offer in *Caspari v. Bohlen*. See, e.g., *Frazer v. South Carolina*, 430 F.3d 696, 704 n.3 (4th Cir. 2005) (raising *Teague* as a threshold issue despite the fact that it was not raised by the State in briefing); *Housel v. Head*, 238 F.3d 1289, 1297 (11th Cir. 2001) (citations omitted) (“This nonretroactivity rule, born in *Teague v. Lane*, is a threshold issue, and one that we have discretion to raise sua sponte.”); *Curtis v. Duval*, 124 F.3d 1, 5 (1st Cir. 1997) (invoking *Teague’s* non-retroactivity principle although it was not relied upon by the Commonwealth); *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996) (finding no error in lower court’s sua sponte raising of *Teague* despite possible state waiver).

<sup>7</sup> Cf. *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (“a State can waive the *Teague* bar by not raising it”); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

<sup>8</sup> This Court held in *Danforth v. Minnesota*, 552 U.S. 264, 279-80 (2008) that state courts may adopt *Teague’s* non-retroactivity principle or an equivalent or broader retroactivity rule. Since *Danforth*, many state courts have elected to adhere to the *Teague* standard when considering the retroactive

(Continued on following page)

Prosecutors seeking to engage in the post-conviction “informed consideration” of immigration penalties will therefore be left, in most cases, without the practical ability to do so.<sup>9</sup> *Padilla*, 130 S. Ct. at 1486.

**B. Claims brought pursuant to *Padilla v. Kentucky* often implicate the State’s interests in proportionality and community and victim safety**

*Amici* urge the Court to consider the particular State interests that are often present in post-conviction claims brought pursuant to *Padilla v. Kentucky*. Central to the prosecutor’s responsibility to

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applicability of constitutional rules of criminal procedure. See, e.g., *In re Gomez*, 199 P.3d 574, 576 (Cal. 2009); *Richardson v. State*, 3 A.3d 233, 238 (Del. 2010); *Alford v. State*, 695 S.E.2d 1, 3 (Ga. 2010); *Rhoades v. State*, 233 P.3d 61, 69 (Idaho 2010); *People v. Sanders*, 939 N.E.2d 352, 358-59 (Ill. 2010); *Perez v. State*, No. 10-1315, 2012 WL 2052399, at \*4 (Iowa June 8, 2012); *Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009); *Danforth v. State*, 761 N.W.2d 493, 498 (Minn. 2009); *State v. Gaitan*, 37 A.3d 1089, 1107 (N.J. 2012); *Kersey v. Hatch*, 237 P.3d 683, 691 (N.M. 2010); *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008).

<sup>9</sup> A post-conviction motion alleging ineffective assistance of counsel pursuant to *Padilla* is likely to be the only vehicle by which a noncitizen defendant may meaningfully challenge a criminal conviction that triggers deportation. The Board of Immigration Appeals has held that pleas vacated “for reasons unrelated to the merits of the underlying criminal proceedings,” such as rehabilitation or humanitarian concerns relating to deportation, remain valid for immigration purposes. *In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003).

promote justice, these interests include the pursuit of proportionate case outcomes as well as the stewardship of community and victim safety.

### 1. Proportionality

A prosecutor may learn in the post-conviction phase of a case that unintended immigration penalties resulted in a final case disposition that is disproportionate to the underlying criminal offense. In such cases, had the prosecutor known of the consequent immigration penalties during the plea bargaining phase of the case, she might very well have worked collaboratively with the defense to negotiate an appropriate immigration-neutral plea. *See Padilla*, 130 S. Ct. at 1486; *cf. INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (noting the frequency with which immigration penalties are factored into plea negotiations). In Santa Clara County, California, for example, *amicus* District Attorney Jeffrey Rosen has instructed his fellow prosecutors that it is incumbent upon them “to consider and, if appropriate, take reasonable steps to mitigate” immigration consequences during case settlement negotiations when those consequences are significantly greater than the punishment for the alleged crime itself. Memorandum from Jeff Rosen, District Attorney, Office of the District Attorney, Santa Clara, California to Fellow Prosecutors (Sept. 14, 2011).<sup>10</sup>

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<sup>10</sup> On file with counsel of record.

Ensuring proportionate outcomes – at any stage of a case – is central to the prosecutor’s pursuit of justice.<sup>11</sup> As this Court has recognized repeatedly, deportation is a harsh penalty that may impact a defendant’s life more significantly than years in prison. *See Padilla*, 130 S. Ct. at 1480 (“deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes”); *see also INS v. St. Cyr*, 533 U.S. 289, 323 (2001); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). This severe a penalty may not comport with the State interest in a proportionate outcome, particularly given that many offenses that trigger the crime-based grounds of removal are non-violent offenses for which a prosecutor might ordinarily recommend no jail time or limited jail time. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2008) (providing that one conviction for a crime involving moral turpitude, regardless of the sentence imposed, constitutes a ground of deportability if committed within five years of the date of admission). The deportation consequence of a conviction drastically alters the prosecutor’s calculus as to whether the case outcome is proportionate to the underlying offense. This is

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<sup>11</sup> *See, e.g.*, American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures v* (2004), available at [http://www.ndaa.org/pdf/prosecution\\_21st\\_century.pdf](http://www.ndaa.org/pdf/prosecution_21st_century.pdf) (calling on prosecutors “to achieve justice in society by holding offenders accountable and applying the force of the law proportionately and fairly”).



especially true in a case like Ms. Chaidez's, where the conviction precludes the defendant from seeking any form of relief from removal in immigration court. See Petition for Writ of Cert. at 4-5, *Chaidez v. United States*, No. 11-820 (U.S. Dec. 23, 2011).

A case recently litigated by *amicus* Dallas County, Texas District Attorney Craig Watkins exemplifies the profound justice interests that often arise in post-conviction claims brought pursuant to *Padilla v. Kentucky*. In 2011, District Attorney Watkins's office received an application for a writ of habeas corpus filed by Mr. M<sup>12</sup> seeking to vacate his 2009 guilty plea to Tex. Penal Code Ann. § 32.31 (2009), credit card abuse. Application for Writ of Habeas Corpus at 1-2, *State v. M*, No. WX 11-xxxxx-V (292nd Jud. Dist. Ct. Tex. Apr. 7, 2011). Mr. M's conviction stemmed from an incident years earlier, in which he had approached an ATM at a local bank to withdraw money from his account and realized that the transaction prior to his had been left open. He withdrew approximately \$500 from the prior customer's account. He was apprehended shortly thereafter at his home, where he immediately confessed and handed the money over to the arresting police officer.

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<sup>12</sup> The defendant's full name and the full case number are omitted from this description and the accompanying citations in order to protect the privacy of the defendant and his family. All cited documents are on file with counsel of record.

The District Attorney's office charged Mr. M with credit card abuse, categorized as the lowest level state felony. True Bill Indictment, *State v. M*, No. F09-xxxxx-V (203rd Jud. Dist. Ct. Tex. Mar. 27, 2009). The prosecuting attorney did not believe jail time was warranted in the case and recommended a plea to the charge with a sentence of three years' probation through a deferred community supervision program and a fine of \$1,500. Mr. M agreed to the plea. Plea Agreement, *State v. M*, No. F09-xxxxx-V (292nd Jud. Dist. Ct. Tex. Nov. 12, 2009).

Mr. M, a lawful permanent resident of the United States, had no idea that his guilty plea would trigger deportation. His attorney failed to advise him of this risk. Application for Writ, *State v. M*, at 2. Subsequent to his plea, he complied fully with the requirements of his probation, maintained regular employment, and married a United States citizen with whom he began a family that now includes two United States-born children. Nonetheless, on return to the United States from a vacation with his family to El Salvador, he was stopped at the border and placed in removal proceedings.<sup>13</sup> *Id.* He filed his motion for relief with Dallas County's Judicial District

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<sup>13</sup> The Department of Homeland Security charged Mr. M with the ground of inadmissibility at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2010), as an individual convicted of a crime involving moral turpitude. Application for Writ of Habeas Corpus at 24, *State v. M*, No. WX 11-xxxxx-V (292nd Jud. Dist. Ct. Tex. Apr. 7, 2011).

Court under threat of deportation and permanent separation from his wife and children.<sup>14</sup> *See id.*

The prosecuting attorney assigned to review the post-conviction motion in Mr. M's case felt that the case outcome, in its entirety, did not comport with justice. Although he had committed a crime, Mr. M had been deprived of a fair proceeding when his attorney failed to advise him that, by pleading guilty, he risked deportation and the inability to be a husband to his wife and a father to his children. Further, the prosecuting attorney originally assigned to the case had not sought any jail time, judging a three year community supervision program and a modest fine to be the appropriate and fitting punishment. The District Attorney's office determined that the addition of deportation to that punishment rendered the case outcome disproportionate to the underlying crime. After the court conducted a hearing on Mr. M's application, District Attorney Watkins's office consented to relief. Motion to Dismiss, *State v. M*, No. F09-xxxxx-V (292nd Jud. Dist. Ct. Tex. Jan. 12, 2012). The judge granted Mr. M's application for a writ and the charges against him have since been dismissed. *Id.* (with court order appended).

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<sup>14</sup> Had Mr. M been removed from the United States, he would have been barred from return for at least ten years pursuant to 8 U.S.C. § 1182(a)(9)(A)(ii)(I) (2010). Subsequent to those ten years, he would have remained inadmissible on the basis of the same 2009 conviction pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I)(2010).

## 2. Community and victim safety

Unintended immigration penalties of a conviction may jeopardize the communities and victims prosecutors seek to serve and protect. Like the responsibility to pursue justice, the prosecutor's responsibility as a steward of community safety is codified in the ethical standards guiding the profession, and is often described as primary to the responsibility to secure convictions in individual cases. *See, e.g., National District Attorneys Association National Prosecution Standards* § 1-1.2 cmt. (2009) (outlining the prosecutor's responsibility to "society as a whole," including "victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.").

A convicted defendant's deportation can have devastating impacts on innocent members of prosecutors' communities. One measure of the community impact of deportation is the number of parents of one or more United States citizen children removed from the United States; this number reached 46,486 for only the first half of fiscal year 2011. U.S. Dep't of Homeland Security Immigration and Customs Enforcement, *Deportation of Parents of U.S.-Born Citizens: Fiscal Year 2011 Report to Congress Second Semi-Annual Report* 4 (2012). The most common change in family structure in the aftermath of an immigration enforcement action is the conversion of a dual-parent home to a single-parent home. *See* The Urban Institute, *Facing Our Future: Children in the*

*Aftermath of Immigration Enforcement* viii (2010). Some children of deported parents are left with no one at all to care for them; at least 5,100 children are currently in the foster care system across the nation subsequent to the immigration detention or deportation of a parent. See Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 22 (2011).

These ripple effects caused by deportation are of vital concern to *amici* because children left behind by deportation are significantly more likely to engage in behavior that is both self-destructive and destructive to the communities in which currently practicing *amici* prosecute. In a study of children whose parents had been the subject of an immigration enforcement action, for example, nearly half began displaying “angry or aggressive” behavior that was persistent over the long term. The Urban Institute, *supra*, at 43. Children raised in non-intact family homes, such as single parent homes or the foster system, demonstrate significantly increased risks of incarceration and illegal behavior. See, e.g., Institute for Marriage and Public Policy, *Policy Brief: Can Married Parents Prevent Crime? Recent Research on Family Structure and Delinquency 2000-2005* 1-2 (2005); Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23 and 24* 22-69 (Chicago: Chapin Hall at the University of Chicago 2009). Children who have aged out of the foster care system report much higher



levels of involvement in the criminal justice system than the nationwide average. Courtney et al., *supra*, at 69. Prosecutors must, therefore, consider the real risk that one defendant's deportation will leave that defendant's child more likely to commit crimes, thereby threatening public safety.

When considering a recent post-conviction motion, for example, *amicus* Santa Clara County, California District Attorney Jeffrey Rosen was largely focused on the safety of a young United States citizen child growing up with a debilitating brain development disorder. This young girl relies heavily on her father, Mr. A,<sup>15</sup> who accompanies her to doctor appointments and therapy sessions and supports her financially and emotionally. Petition for a Writ of Habeas Corpus at Ex. K, *People v. A*, No. CC 0xxxxxx (Super. Ct. Cal. Nov. 22, 2011). At the age of 21, however, before his daughter was born, Mr. A had been convicted of a drug-related offense. Years later, that conviction triggered removal proceedings and threatened Mr. A's ability to remain in the United States with his family.

In 2000, Mr. A was arrested and charged in a two count complaint with possession of a controlled substance for sale, Cal. Health & Safety Code § 11378

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<sup>15</sup> The defendant's full name and the full case number are omitted from this description and the accompanying citations in order to protect the privacy of the defendant and his family. All cited documents are on file with counsel of record.

(2011), and transportation of a controlled substance, Cal. Health & Safety Code § 11379 (2011). Felony Complaint at 1, *People v. A*, No. CC 0xxxxxx (Super. Ct. Cal. Dec. 5, 2000). The District Attorney's office offered Mr. A a plea settlement to either count. On advice of counsel, he chose to plead to the possession for sale offense, section 11378, and was sentenced to 364 days in jail and a term of probation. Petition, *People v. A*, at 2.

Mr. A is a lawful permanent resident who has lived in the United States since the age of 10. Petition, *People v. A*, at Ex. J. He stated in his petition that he had received no advice from his attorney regarding immigration consequences. *Id.* Mr. A had no way of knowing that his conviction constituted an aggravated felony under the immigration law, mandating removal with no possibility of relief.<sup>16</sup> He similarly could not have known that the alternative plea offered by the prosecution – to section 11379 –

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<sup>16</sup> A conviction for the sale of methamphetamine pursuant to Cal. Health & Safety Code § 11378 (2011) falls within the “illicit trafficking in a controlled substance” aggravated felony grounds of removal. See 8 U.S.C. § 1101(a)(43)(B) (2011); 8 U.S.C. § 1227(a)(2)(A)(iii) (2008); see also, e.g., *Garcia-Gomez v. Holder*, No. 10-72740, 2012 WL 1065568, at \*1 (9th Cir. Mar. 30, 2012). With minor exceptions not relevant here, an aggravated felony conviction precludes the immigration adjudicator from considering relief from removal regardless of an individual's equities. See, e.g., 8 U.S.C. § 1229b(a)(3) (2008) (providing the aggravated felony bar to relief in the form of “cancellation of removal for certain permanent residents”); see also *Padilla*, 130 S. Ct. at 1480.

would have preserved his eligibility for relief from removal.<sup>17</sup> Nine years later, the Department of Homeland Security initiated removal proceedings against Mr. A after he applied for a replacement for his lawful permanent resident card. Petition, *People v. A*, at Ex. H.

In the years subsequent to his 2001 conviction, Mr. A had no further contact with the criminal justice system. Petition, *People v. A*, at 2, Ex. F. He is now a responsible father of two United States citizen daughters and has worked in construction for the same employer for nine years. *Id.* at 2, 8, Ex. G. In 2011, Mr. A petitioned the court to withdraw his 2001 plea on the basis of ineffective assistance of counsel. Petition, *People v. A*, at 25. The safety and well-being of Mr. A's family and community weighed heavily on the prosecuting attorney assigned to review the case. Mr. A's daughters' mother had provided a letter in support of Mr. A's petition, explaining the "integral part" he plays in his daughters' lives and attesting that it would be "emotionally devastating" should he be deported. Petition, *People v. A*, at Ex. K. She provided the court with information regarding her daughter's ongoing physical disabilities. *Id.* In pursuit of a just outcome, the prosecuting attorney

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<sup>17</sup> See *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1128-29 (9th Cir. 2007) (finding a conviction pursuant to Cal. Health & Safety Code § 11379 (2011) is not categorically an aggravated felony and therefore "does not foreclose" eligibility for relief in the form of cancellation of removal).

agreed to enter into a stipulation with Mr. A, allowing him to withdraw his plea to section 11378 and enter a new plea to section 11379 *nunc pro tunc* to the date of the original plea. See Stipulation and Order at 1, *People v. A*, No. CC 0xxxxx (Super. Ct. Cal. Dec. 8, 2011). This agreement furthered the interests of both parties: for District Attorney Rosen's office, the integrity of the conviction was maintained as the new plea was appropriate to the underlying offense and actually carried a higher maximum sentence exposure than the original plea; and Mr. A was given the opportunity to petition the immigration judge for a second chance to remain in the United States with his family.

In some cases, the family members who feel the financial and emotional impact of deportation most deeply are themselves the victim of the underlying crime, individuals prosecutors are duty bound to protect and serve.<sup>18</sup> This is most often the case in domestic violence prosecutions, where the defendant's deportation may leave the crime victim behind as a single parent without marital and/or child support. The American Bar Association's Criminal Justice Section has noted that in many domestic violence cases it is the "strong wish" of the victim to avoid the

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<sup>18</sup> See, e.g., *National District Attorneys Association National Prosecution Standards* § 1-1.1 (2009) ("The [prosecutor's primary] responsibility includes . . . ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected."); American Prosecutors Research Institute, *supra* note 11, at 11.

defendant's deportation because she "wants the protections afforded in a domestic violence [case], but does not want the abuser deported because of a need for continuing child support or a desire to try to salvage a parent-child or couple relationship." ABA Criminal Justice Section, *Recommendation Adopted by the House of Delegates No. 100C 5* (2010). In such cases, the Criminal Justice Section encourages prosecutors, judges, and criminal defense attorneys to adopt one of many "basic immigration strategies that are designed to give the prosecution what is required, while avoiding making the defendant removable or ineligible for relief from removal." *Id.* at 4.

**C. The State's interest in ensuring just outcomes for noncitizen defendants does not end at conviction**

It is well-settled that the prosecutor's interests in pursuing justice extend into the post-conviction phase of a case. More than thirty-five years ago, this Court recognized that a prosecutor is "bound by the ethics of his office" even after securing a conviction. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). This consensus understanding that the obligations of the State continue beyond conviction has been recently codified in the Model Rules of Professional Conduct, which as of 2008 require a prosecutor to take remedial steps in the post-conviction phase of a case when she is aware of evidence establishing or suggesting a



defendant's innocence. *Model Rules of Prof'l Conduct* R. 3.8(h) (2010).<sup>19</sup>

The extent to which a post-conviction motion implicates prosecutorial interests varies widely depending on the substance of the claim. See Zacharias, *supra*, at 176-85. For example, a post-conviction claim brought on the basis of new evidence establishing innocence goes directly to the heart of the prosecutor's obligation as a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). However, a claim brought on the basis of a procedural defect that does not sully the integrity of the finding of guilt nor the fairness of the case outcome will implicate fewer prosecutorial interests. A claim brought pursuant to the type of ineffective assistance of counsel addressed in *Padilla v. Kentucky*

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<sup>19</sup> The amendment of Rule 3.8 (governing "Special Responsibilities of a Prosecutor") to include post-conviction obligations is particularly noteworthy because the amendment process has been described as a "ground-up reform" approach by which the amendment came to represent a consensus among all players in the criminal justice system. See Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 Geo. J. Legal Ethics 427, 457 (2009). Although model ethics rules and ethics opinions are usually proposed by the ABA's Ethics Committee, this amendment was initially proposed by the Criminal Justice Section, representing prosecutors, defense attorneys, and judges working in the criminal justice system. See *id.* at 460. Furthermore, the amendment's origins can be traced to local reform initiatives, namely a proposal adopted by the New York State bar in 2000. See *id.* at 461.

may very well impact questions of proportionality and community and victim safety, elevating its centrality to the prosecutor's mission. The stories of Mr. M and Mr. A in Section I.B above illustrate that, where immigration penalties are present, the post-conviction phase of a case often presents the prosecutor with the sole opportunity to adjust a case disposition so that it aligns with State interests.

## II. THE STATE'S INTEREST IN MAINTAINING THE DISCRETION TO RESPOND APPROPRIATELY TO *PADILLA* CLAIMS OUTWEIGHS CASE MANAGEMENT CONCERNS

Like all post-conviction litigation, post-conviction motions brought pursuant to *Padilla v. Kentucky* raise concerns for the State regarding safeguarding the finality of convictions.<sup>20</sup> However, in *amici's* belief, these concerns are vastly outweighed by the State interest in preserving the discretion to choose how to respond to motions raised by defendants facing immigration penalties on the basis of prior convictions. First, assuming an outcome favorable to the Petitioner in this matter, there will remain significant

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<sup>20</sup> See, e.g., *U.S. v. Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." (quoting *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting))).

barriers to relief under *Padilla v. Kentucky* that will both limit the number of actions brought and allow prosecutors to vigorously oppose those motions lacking in merit or worth. Second, as discussed in Section I.B above, the specter of a defendant's deportation implicates prosecutorial interests in ways that many post-conviction motions do not. These interests often ripen with time, such that post-conviction claims raised on convictions secured prior to the decision date in *Padilla v. Kentucky* are often among the most worthy of a positive exercise of prosecutorial discretion.

**A. Significant barriers to relief under *Padilla v. Kentucky* mitigate finality concerns, regardless of retroactivity**

Should the Court find *Padilla v. Kentucky* to have retroactive application, noncitizen defendants will continue to face numerous procedural, jurisdictional, and substantive barriers to relief. These barriers, first, greatly limit the number of claims brought pursuant to *Padilla v. Kentucky*. Second, they equip prosecutors with the tools to assert a robust opposition in cases where the prosecutor finds the original case outcome, including the consequent deportation, to have been just.

Regardless of *Padilla v. Kentucky*'s retroactive applicability, noncitizen defendants seeking post-conviction relief under the decision must meet each element of the standard for ineffective assistance of

counsel set out by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) in order to succeed. See *Padilla*, 130 S. Ct. at 1482. To do so, the claimant must prove that 1) counsel's conduct fell below a standard of reasonableness under prevailing professional norms due to misadvice or lack of advice regarding deportation risks, and 2) the outcome of the proceeding was prejudiced by that ineffective assistance. *Id.*

This Court has noted that, "Surmounting *Strickland*'s high bar is never an easy task." *Padilla*, 130 S. Ct. at 1485.<sup>21</sup> Indeed, in establishing the first prong of *Strickland*, it is the defendant's burden to overcome the "strong presumption" that counsel's conduct was reasonable. *Strickland*, 466 U.S. at 689. This burden is "most substantial" in cases settled by plea due to the "added uncertainty" inherent in the evidentiary record in such cases. *Premo v. Moore*, 131 S. Ct. 733, 745 (2011). For defendants able to meet this first step of establishing unreasonable conduct by counsel, it is nonetheless "often quite difficult" to

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<sup>21</sup> See also *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential."); *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("... [T]he standard for judging counsel's representation is a most deferential one."); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

satisfy *Strickland*'s prejudice requirement. *Padilla*, 130 S. Ct. at 1485 n.12.<sup>22</sup>

Furthermore, some lower courts have imposed time bars on defendants' eligibility for relief pursuant to *Padilla v. Kentucky*<sup>23</sup> and others have restricted the availability of vehicles such as *coram nobis* and habeas corpus to assert *Padilla*-based claims for

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<sup>22</sup> Defendants seeking to establish prejudice must demonstrate that the proceedings were rendered "fundamentally unfair" by counsel's deficient performance. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Judicially imposed requirements for establishing prejudice in ineffective assistance claims brought pursuant to *Padilla v. Kentucky* are often quite strict. See, e.g., *United States v. Hough*, No. 2:02-cr-00649-WJM-1, 2010 WL 5250996, at \*5 (D.N.J. Dec. 17, 2010) (finding defendant was not prejudiced by counsel's failure to inform him of the risk of deportation where the evidence against him "was strong," rendering "dubious" his claim that he would have proceeded to trial with proper counsel); *Flores v. Florida*, 57 So.3d 218, 220 (Fla. Dist. Ct. App. 2010) (finding defendant's claim of prejudice precluded by a judicial advisal regarding deportation risk given during the plea colloquy).

<sup>23</sup> See, e.g., *Smith v. State*, 85 So.3d 551, 552 (Fla. Dist. Ct. App. 2012) (citing *State v. Green*, 944 So.2d 208, 218 (Fla. 2006)) (finding a motion brought pursuant to *Padilla v. Kentucky* more than two years subsequent to the date of judgment and sentence untimely under the state's post-conviction statute, Fla. R. Crim. P. R. § 3.850 (2011)); *El Eid v. State*, No. A11-898, 2012 WL 539186, at \*4 (Minn. Ct. App. Feb. 21, 2012) (finding the state post-conviction statute at Minn. Stat. Ann. § 590.01(4)(c) (2005) to require claims of ineffective assistance pursuant to *Padilla v. Kentucky* to be brought within the two-year period after an event establishing a right to relief such as immigration consequences that arise as a result of a guilty plea).



relief.”<sup>24</sup> As California’s Fourth District Court of Appeal has stated, “*Padilla* does not require states to provide an avenue for noncitizens to challenge their convictions based on an erroneous immigration advisement when no other remedy is presently available.” *People v. Shokur*, 141 Cal.Rptr.3d 283, 288 (Cal. Ct. App. 2012).

**B. In those cases where a remedy does exist, the State’s interest is often greater with regard to convictions that pre-date the *Padilla v. Kentucky* decision**

Where a legal remedy does exist, prosecutors weigh many factors when determining how to respond to a post-conviction motion brought pursuant to *Padilla v. Kentucky*. In weighing these factors, the prosecution often discovers that the State’s interest in an adjusted case outcome is strongest in post-conviction litigation on older convictions that pre-date the decision in *Padilla v. Kentucky*.

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<sup>24</sup> In *People v. Fernandez*, for example, California’s Second District Court of Appeal noted that the retroactive application of *Padilla v. Kentucky* is “simply beside the point” where no vehicle exists for the appellant to raise his claim. No. B229073, 2011 WL 4357730, at \*4 (Cal. Ct. App. Sept. 20, 2011) (citing *People v. Kim*, 202 P.3d 436, 448 (Cal. 2009)) (finding Fernandez’s claim of ineffective assistance not cognizable on coram nobis). See also *People v. Constantino*, No. H037018, 2011 WL 6000881, at \*2 (Cal. Ct. App. Dec. 1, 2011) (finding *Padilla v. Kentucky* to have “no application” where defendant was not in actual or constructive custody).

Factors that weigh in the prosecutor's exercise of discretion on a post-conviction motion brought pursuant to *Padilla v. Kentucky* might include: the severity and nature of the crime; the impact of the defendant's deportation on the victim and the wider community; and the defendant's positive and negative equities. In many cases, the years that have passed between a conviction and the filing of a post-conviction motion will significantly alter the balance of these factors. During the ensuing years, a noncitizen defendant may have accrued such positive equities as marriage to a United States citizen spouse, the birth of one or more United States citizen children, the provision of financial support to immediate family or other community members, and/or a consistent employment history. In these cases, the deportation penalty attached to the conviction ripens into a harsher and less proportionate component of the case outcome than it was at the time of the conviction. Furthermore, the hardship caused by deportation to the defendant and the defendant's family and community will have increased dramatically.

The post-conviction claims in the cases of Mr. M and Mr. A, discussed in Section I.B, *supra*, were brought in the recent past challenging convictions secured in 2009 and 2000, both prior to the decision in *Padilla v. Kentucky*. In both cases, the defendants had maintained clean records in the years since their convictions and deepened their ties to the United States through continued employment and growing families. In both cases, the prosecuting attorneys

were compelled to consent to an adjusted disposition because of the significant State interests present – the pursuit of proportionate case outcomes and the well-being of innocent spouses and children who would be devastated by the defendants' deportations. These interests were altered dramatically by the events that transpired in the years subsequent to Mr. M and Mr. A's convictions.

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## CONCLUSION

*Amici* are concerned that a ruling adverse to the Petitioner in this case will restrict prosecutors nationwide from exercising meaningful discretion on *Padilla*-based claims merely because of the date of the original conviction. As the case examples in Section I.B demonstrate, a post-conviction motion brought pursuant to *Padilla v. Kentucky* may provide the State with the sole opportunity to adjust a case outcome that flies in the face of varied and compelling State interests. This opportunity should not be lost or gained simply because the conviction falls on the wrong side of March 31, 2010.

For the reasons set forth above, *amici* respectfully submit that the decision of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

HEIDI ALTMAN  
*Counsel of Record*  
CENTER FOR APPLIED  
LEGAL STUDIES  
GEORGETOWN LAW SCHOOL  
600 New Jersey Avenue NW,  
Suite 332  
Washington, DC 20001  
(202) 662-9571  
hra8@law.georgetown.edu

MICHAEL K. GOTTLIEB  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street, NW  
Washington, DC 20005  
(202) 339-8400  
*Counsel for Amici Curiae*  
July 23, 2012

**APPENDIX A:**

***Amici Curiae* Active and Former State  
and Federal Prosecutors**

**A. Bates Butler III**

United States Attorney, District of Arizona  
(1980-1981)

First Assistant United States Attorney, District of  
Arizona (1977-1980)

Deputy Pima County (Arizona) Attorney (1970-1977)

**Paul Butler**

Trial Attorney, United States Department of Justice,  
Criminal Division (1990-1993)

**Zachary W. Carter**

United States Attorney, Eastern District of New York  
(1993-1999)

**W.J. Michael Cody**

Attorney General, State of Tennessee (1984-1988)

United States Attorney, Western District of Tennessee  
(1977-1981)

**Robert Del Tufo**

Attorney General, State of New Jersey (1990-1993)

United States Attorney, District of New Jersey  
(1977-1980)

**W. Thomas Dillard**

United States Attorney, Northern District of Florida  
(1983-1987)

United States Attorney, Eastern District of Tennessee  
(1981)

Assistant United States Attorney, Eastern District of  
Tennessee (1967-1976, 1978-1982)



App. 2

**Bennett L. Gershman**

Prosecutor, New York County District Attorney's  
Office (1967-1972)

Prosecutor, New York Special State Prosecutor  
(1973-1976)

**Daniel Goldstein**

Assistant United States Attorney, District of  
Maryland (1976-1982)

**Bruce R. Jacob**

Assistant Attorney General, State of Florida  
(1960-1962)

**Robert M.A. Johnson**

President, National District Attorneys Association  
(2000-2001)

County Attorney, Anoka County, Minnesota  
(1983-2011)

**Thomas L. Johnson**

Hennepin County Attorney, Minnesota (1979-1991)

**Jeremy Lasnetski**

Division Chief, Repeat Offender Unit, State Attorney,  
4th Judicial Circuit of Florida (2007-2008)

Prosecutor, State Attorney, 4th Judicial Circuit of  
Florida (2001-2007)

**E. Michael McCann**

District Attorney, Milwaukee County, Wisconsin  
(1969-2006)

**Kenneth J. Mighell**

United States Attorney, Northern District of Texas  
(1977-1981)

Assistant United States Attorney, Northern District  
of Texas (1961-1977)

**H. James Pickerstein**

United States Attorney, District of Connecticut (1974)  
Chief Assistant United States Attorney, District  
of Connecticut (1974-1986)

**Richard J. Pocker**

United States Attorney, District of Nevada  
(1989-1990)

**Jeffrey Rosen**

District Attorney, Santa Clara County, California  
(2011-Present)

**Harry L. Shorstein**

State Attorney, 4th Judicial Circuit of Florida  
(1991-2009)

**Thomas P. Sullivan**

United States Attorney, Northern District of Illinois  
(1977-1981)

**John Van de Kamp**

Attorney General, State of California (1983-1991)  
District Attorney, Los Angeles County, California  
(1975-1983)  
United States Attorney, Central District of California  
(1966-1967)

**Craig Watkins**

District Attorney, Dallas County, Texas  
(2006-Present)

**David M. Zlotnick**

Assistant United States Attorney, Washington D.C.  
(1989-1993)

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**AMICUS  
CURIAE  
BRIEF**

IN THE

# Supreme Court of the United States

ROSELVA CHAIDEZ,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## **BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

DEBORAH S. SMITH  
LAW OFFICE OF  
DEBORAH S. SMITH  
7 West Sixth Avenue, Suite 4M  
Helena, Montana 59601  
(406) 461-6709  
deb@debsmithlaw.com

REBECCA SHARPLESS  
IMMIGRATION CLINIC  
UNIVERSITY OF MIAMI  
SCHOOL OF LAW  
1311 Miller Drive, E273  
Coral Gables, Florida 33146  
(305) 284-3576  
rsharpless@law.miami.edu

IRA J. KURZBAN  
*Counsel of Record*  
KURZBAN, KURZBAN, WEINGER,  
TETZELI & PRATT P.A.  
2650 S.W. 27th Avenue,  
2nd Floor  
Miami, Florida 33133  
(305) 444-0060  
ira@kkwtlaw.com

*Attorneys for Amicus Curiae*  
*American Immigration Lawyers Association*

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## INTERESTS OF *AMICUS CURIAE*

The American Immigration Lawyers Association (“AILA”) is a voluntary bar association formed in 1946, and comprised of more than 11,000 lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

AILA has appeared as *Amicus* before this Court in numerous cases relating to the administration and interpretation of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, including recently in *Vartelas v. Holder*, No. 10-1211; *Judulang v. Holder*, No. 10-694; and *Kawashima v. Holder*, No. 10-577.<sup>1</sup>

*Amicus*’s members comprise the professional association of immigration lawyers. They are well-placed to convey the practical import of this Court’s affirming that the rule of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), has retroactive effect. In this brief, *Amicus* highlights some of the lives already changed

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus*, its members, and their counsel made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk.



by *Padilla*, through a sample of cases characterized by equities including rehabilitation, military service, and deep familial and community ties to the United States. These individuals await a ruling by this Court that the Constitution's venerable guarantee of effective assistance of counsel applies without regard to the vagary of when a conviction became final.

## SUMMARY OF ARGUMENT

*Amicus's* brief describes immigrants whose lives will be affected profoundly by the Court's resolution of this case. They are people for whom the stakes could not be higher, as their ability to remain with their families in the United States hinges on *Padilla's* retroactive effect. For a number of these immigrants, the United States is the only home they have or can remember.

Criminal defense attorneys informed their clients about the immigration consequences of plea agreements for many years before *Padilla*. In light of prevailing professional norms to advise noncitizen criminal defendants about such consequences, *Padilla* held that the *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel test applies when attorneys fail to inform noncitizen defendants that their plea agreements would render them deportable. *See Padilla*, 130 S. Ct. at 1482. Abiding by these norms, attorneys were frequently able to secure plea agreements for their clients that did not result in deportation. Noncitizens who received effective assistance of counsel often avoided immigration detention, removal, and permanent separation from their U.S. citizen spouses and children.

But sometimes counsel fell short of his or her professional obligations, and failed to advise a noncitizen defendant about immigration consequences before the defendant entered a guilty plea. Such shortcomings have caused dire consequences including deportation, which the Court has recognized as the “equivalent of banishment or exile.” *Id.* at 1486 (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 390 (1947)). Without criminal defense counsel being mindful of the immigration backdrop during plea negotiations for a noncitizen, some offenses result in near-automatic deportation, such as those labeled “aggravated felonies” under the INA. See 8 U.S.C. § 1101(a)(43) (delineating a broad range of offenses in twenty-one separate clauses, ranging from murder to much less serious, nonviolent crimes). An outcome as extreme as deportation, envisioned by neither the prosecutor nor the criminal defense attorney—and least of all by the noncitizen defendant—could, and did, occur without the benefit of prosecutorial discretion and plea bargaining. These central features of criminal justice adjudication might have allowed the parties to reach a plea agreement satisfying the government’s law-enforcement objectives while at the same time ameliorating adverse immigration consequences.

Congress’ gradation of offenses in the INA, which calibrates their seriousness with corresponding immigration consequences, envisions that such prosecutorial discretion and plea bargaining would take place to avoid disproportionately severe immigration results in compelling cases. By establishing harsh consequences for noncitizens who commit “aggravated felonies”—offenses for which especially

punitive measures are imposed, such as mandatory custody, *id.* § 1226(c); manifold bars to relief, meaning that “removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion,” *Padilla*, 130 S. Ct. at 1480; and a permanent bar to returning to the United States, *see* 8 U.S.C. § 1182(a)(9)(A)(ii)—Congress intended for the criminal justice system to sift cases and refer only certain ones for the least forgiving immigration treatment.

Where ineffective assistance of counsel led to a lack of awareness of the immigration dimension of a criminal conviction, there was no triage to determine the most serious offenses worthy of the harshest immigration consequences. In these defective proceedings, all actors in the criminal justice system—the prosecutor, the criminal defense attorney, and the judge—operated under a veil of ignorance that concealed immigration consequences, “sometimes the most important part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla*, 130 S. Ct. at 1480; *cf. Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012) (“The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations.”). The Court should acknowledge *Padilla*’s retroactivity in order to ensure that criminal defense attorneys’ errors falling below the prevailing professional norms of representation do not lead to devastating repercussions for their

clients, in contravention of how Congress designed the immigration consequences of criminal convictions.

The Department of Homeland Security (DHS) can initiate removal proceedings against a noncitizen due to a criminal conviction at any point after the individual pleads guilty. Deportation proceedings may start decades after a conviction. Some noncitizens have not yet discovered that old, low-level offenses preceding *Padilla* have rendered them deportable. This Court's confirmation that *Padilla* has retroactive effect would allow noncitizens prejudiced by ineffective assistance of counsel to make new, informed decisions about their plea agreements, as the Constitution requires.

In jurisdictions where *Padilla* has been held to be retroactive and meritorious applicants have had their convictions vacated, noncitizens have negotiated new plea agreements with prosecutors that avoid deportation consequences while requiring the noncitizens to repay their debts to society in full. Without *Padilla* retroactivity, those exposed to ineffective assistance of counsel prior to March 31, 2010, will be at immediate risk of deportation despite being convicted in violation of the Constitution. This group includes parents and spouses of U.S. citizens, refugees and asylees, and military veterans who honorably served this country.

## ARGUMENT

- I. Professional norms required criminal defense attorneys to discuss the immigration consequences of plea agreements with their clients for many**

**years prior to *Padilla*; those convicted before *Padilla* without effective assistance of counsel should therefore have an opportunity to revisit the convictions that rendered them deportable.**

Every criminal defendant has long been entitled to the effective assistance of counsel. See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Gideon v. Wainwright*, 372 U.S. 335, 344–345 (1963); *Glasser v. United States*, 315 U.S. 60, 75–76 (1942). The Constitution forbids a criminal defendant—regardless of citizenship—to be left to the “mercies of incompetent counsel.” *Padilla*, 130 S. Ct. at 1486 (citing *McMann*, 397 U.S. at 771). “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. A defendant is entitled to relief if an attorney’s deficient performance prejudiced the defendant. *Id.* at 688, 694.

#### **A. The immigration consequences of plea agreements.**

This Court has emphasized for at least 90 years that deportation is an especially harsh punishment, “the equivalent of banishment or exile.” *Padilla*, 130 S. Ct. at 1486 (citing *Delgadillo*, 332 U.S. at 390). Deportation “obviously deprives [a person] of liberty. . . . It may result also in loss of both property and life, or of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). “[D]eporation is an integral part—indeed, sometimes the most important part—of the penalty



that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla*, 130 S. Ct. at 1480. “[A] deported alien may lose his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution, and even death.” *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

As *Padilla* recounted, noncitizens have been rendered deportable for designated criminal convictions since 1917, when INA § 19 attached deportation consequences to crimes involving moral turpitude. Judicial recommendations against deportation (JRADs) were available to sentencing judges, who could bind the Executive branch not to deport a particular noncitizen defendant. In 1952, Congress curtailed JRADs, and in 1990 eliminated them completely. Subsequently, in 1996, Congress sharply limited the Attorney General’s discretionary power to stop a deportation that is based on criminal grounds. See *Padilla*, 130 S. Ct. at 1478–80.

The current INA includes twenty-one categories of criminal convictions that lead to near-mandatory deportation because they are “aggravated felonies.” See 8 U.S.C. § 1101(a)(43). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act vastly expanded the scope of “aggravated felonies” and made the definition retroactive. See Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546. Even broader categories of offenses require mandatory immigration custody while it is determined whether or not an alleged noncitizen is deportable or has available relief. *Id.* § 1226(c). After removal for an aggravated felony, a noncitizen is permanently barred from returning to the United States. *Id.* § 1182(a)(9)(A)(ii). Noncitizens

are frequently detained for months or years pending deportation proceedings. *See generally* Brief for *Amici Curiae* Asian American Justice Center, Mexican American Legal Defense and Educational Fund et al. in *Padilla v. Kentucky*, No. 08-651.

The particular offense to which a noncitizen pleads is therefore crucial. Both serious and some minor crimes can result in deportation proceedings, with varying possibilities for relief. Low-level crimes with immigration consequences have included: shoplifting \$14.99 worth of baby clothes, a \$10 sale of marijuana, urinating at a construction site, jumping subway turnstiles, and “mooning.”<sup>2</sup>

Because the consequences of a criminal conviction can be so severe for a noncitizen, prevailing professional norms for criminal defense attorneys have required them to inform clients of guilty pleas’ deportation consequences. *Padilla* concluded, supported by extensive citation, that these norms had existed “for at least” 15 years before the Court’s March 2010 decision. *Padilla*, 130 S. Ct.

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<sup>2</sup> *See Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H.R. Comm. on the Judiciary*, 110th Cong. 33 (2007) (prepared statement of Paul Virtue, former INS Commissioner); Patrick J. McDonnell, *Deportation Shatters Family*, L.A. Times (Mar. 14, 1998) (describing a teenage child’s suicide in the wake of his father’s deportation for sale of \$10 of marijuana after 29 years of lawful residence); Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* 54 (2007), [http://www.hrw.org/sites/default/files/reports/us0409webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0409webwcover_0.pdf); *see also Johnson v. Holder*, 413 F. App’x 435 (3d Cir. 2010), *vacated in part as moot*, 2011 U.S. App. LEXIS 2593 (3d Cir. Feb. 9, 2011); *Ferguson v. Att’y Gen. of U.S.*, 216 F. App’x 217, 218 (3d Cir. 2007).

at 1483–84 (citing, inter alia, ABA Standards for Criminal Justice, *Prosecution Function and Defense Function* 4–5.1(a), p. 197 (3d ed. 1993); National Legal Aid and Defender Assn., *Performance Guidelines for Criminal Representation* § 6.2 (1995); G. Herman, *Plea Bargaining* § 3.03, pp. 20–21 (1997); ABA Standards for Criminal Justice, *Pleas of Guilty* 14–3.2(f), p. 116 (3d ed. 1999)).

The standards on which *Padilla* relied were in place even before 1995. See, e.g., Maryellen Fullerton & Noah Kingstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425, 445 (1986) (“Defense attorneys must educate themselves about the immigration consequences [of a plea;] . . . [o]therwise, the results could be drastic.”); ABA Standards for Criminal Justice, *Pleas of Guilty*, 14–3.2 (2d ed. 1980 & Supp. 1986) (defense attorneys should advise clients about deportation consequences of guilty pleas).

At the time of petitioner Roselva Chaidez’s conviction in 2003, prevailing professional norms dictated that attorneys inform their clients of the deportation consequences attaching to their guilty pleas. Many attorneys acted conscientiously in fulfilling this duty. Consider **Donald Gutierrez**,<sup>3</sup> a lawful permanent resident who has been in the United States for more than thirty years, after leaving the Philippines as a young teenager. His

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<sup>3</sup> Donald Gutierrez is a pseudonym, as requested by his counsel, who has provided a signed letter attesting to counsel’s review of the account of Gutierrez’s case contained in this brief. This document is on file with counsel for *Amicus* and is available at the Court’s request.

father fought alongside American forces in the Philippines during World War II. Gutierrez married in the United States, and has two U.S. citizen children and a U.S. citizen grandchild.

In 2009, Gutierrez's mother died, and he and his wife went through a brief separation. During this period Gutierrez was unable to find work, and slept in his car. Because he had been his mother's caretaker, he received benefits checks on her behalf. After she died, he did not report her death and continued to cash the checks. Gutierrez was charged with fraud under 18 U.S.C. § 641.

Gutierrez's counsel knew that the charge would qualify as fraud with a loss to the victim of more than \$10,000, an aggravated felony under the INA. See 8 U.S.C. § 1101(a)(43)(M)(i). Through a series of negotiations, she was able to convince prosecutors that Gutierrez's certain deportation was overly harsh punishment, and that he could better pay restitution while remaining in the United States. She obtained a diversion agreement for Gutierrez, under which he would pay restitution and perform community service at a senior citizens' center. After one year, the charge was dismissed.

Gutierrez is deeply remorseful about his crime, and breaks down in tears every time the topic comes up. After completing his community service, Gutierrez continued to volunteer at the senior citizens' center because he felt he should do more to repay a country he loves. He volunteers there to this day. In grateful letters to his lawyer, Gutierrez conveyed his terror of returning to the Philippines; he does not know anybody there and cannot speak Tagalog.

Worse, he feared not being able to watch his American grandchild grow up, and banishment from his U.S. citizen children. Gutierrez was saved from this fate by his counsel's adherence to the prevailing professional norms recognized by *Padilla*.

When **Robert Rodriguez**<sup>4</sup> was 18, Rodriguez helped a friend take the tailgate off a pickup truck. Rodriguez's friend had told him that he knew the owner of the truck, his ex-girlfriend, and said he wanted to play a prank on her. Rodriguez agreed to let his friend keep the tailgate at Rodriguez's house for the night, but the friend did not return to collect it. Rodriguez was charged with theft, an offense that would render him deportable to Mexico because it is a crime involving moral turpitude and his lawful permanent resident status was less than five years old. See 8 U.S.C. § 1227(a)(2)(A)(i)(I). Rodriguez's trial attorney did not inform him of the deportation jeopardy resulting from a conviction, and Rodriguez pled guilty. He was ordered into deferred adjudication and required to pay restitution to the victim.

Immigration and Customs Enforcement (ICE) initiated deportation proceedings against Rodriguez, and Rodriguez spent two years in immigration detention. Numerous people wrote letters of support for him, including teachers and the principal at his high school, guidance counselors, his soccer coach, mentors, neighbors he helps with yard work and

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<sup>4</sup> Robert Rodriguez is a pseudonym, as requested by his counsel, who has provided a signed letter attesting to counsel's review of the account of Rodriguez's case contained in this brief. This document is on file with counsel for *Amicus* and is available at the Court's request.



house-sitting, the pastor of his youth group, and other church pastors.

A Texas state court ruled that *Padilla* is retroactive and granted Rodriguez a hearing to determine whether Rodriguez's attorney failed in his professional duties under *Strickland* and *Padilla*. The prosecutor subsequently agreed to vacate the plea agreement and formulate an agreement with Rodriguez's current attorney that would not render Rodriguez deportable. *Chaidez* will directly address the fates of valued community members like Robert Rodriguez.

**B. Defendants whose attorneys did not adhere to professional norms have been deported or are living in the shadow of deportation.**

For defendants whose attorneys failed to advise them of their guilty pleas' immigration consequences, deportation has resulted even for minor offenses. For instance, one grandfather who had been a lawful permanent resident of the United States for 50 years was arrested when police found marijuana in his grandson's room. See Catholic Legal Immigration Network, Inc., *The Impact of Our Immigration Laws and Policies on U.S. Families* 41 (2000). Following his attorney's advice, the man pled guilty to drug possession. Twenty years later, at the age of 81, he was deported because of the conviction. *Id.*

**Jorge (George) Aguilar's** case further illustrates the plight of clients whose lawyers failed to provide them effective assistance of counsel regarding deportation consequences before *Padilla*.



Aguilar emigrated to the United States legally from El Salvador in 1994, when he was 10 years old. Raised in Oklahoma, he became a lawful permanent resident.

When Aguilar was 20, he and two friends stole electronics from three churches near their homes. In 2004, two years after Jose Padilla's conviction in Kentucky, Aguilar pled guilty to burglary on the advice of his attorney and received a deferred sentence. Aguilar's attorney did not inform him that his conviction would render him subject to deportation.

The conviction changed Aguilar's life. He began attending church services at First Baptist Church of Broken Arrow, Oklahoma, one of the churches he had robbed. He volunteered to help immigrants learn English, earned his GED, and retained a steady job. The church members accepted "George" as one of their own. Senior Pastor Nick Garland has remarked that the congregation fell in love with him: "I saw Jesus Christ change this young man. This was a life-changing commitment, and it was a beautiful process for him." See Ginnie Graham, *Broken Arrow Immigrant's Case Calls Federal Laws into Question*, Tulsa World (Nov. 20, 2011).<sup>5</sup>

Aguilar paid his court-ordered fines and restitution, and completed community service required by the plea agreement. Five years after his guilty plea, the charges were expunged from Aguilar's record. By then, Aguilar was known as a young man who dug neighbors' cars out of the snow,

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<sup>5</sup> This account also draws on correspondence between *Amicus* and Aguilar's counsel, which is on file with counsel for *Amicus* and available at the Court's request.

picked up strangers in the rain, and gave his lunches to homeless people he passed in the street. "Like a son" to Pastor Garland, Aguilar's goal in life is to become a youth minister advising troubled teenagers. *Id.*

Deferred sentences and expungements, however, are considered to remain convictions for purposes of immigration law. See 8 U.S.C. § 1101(a)(48)(A). In 2010, ICE initiated removal proceedings against Aguilar. He was incarcerated at the Tulsa jail for nine months as his case was heard. See Graham, "Broken Arrow," *supra*.

During his detention, Aguilar helped immigrants with document translation and led a Bible study group. Church members came once a week to see how he was doing, prayed for him at their services, and started a fund to pay his legal expenses. *Id.*

Aguilar's criminal defense attorney signed an affidavit admitting that he failed to discuss the immigration consequences of Aguilar's plea agreement with him, but Aguilar was deported to El Salvador in late 2011, suddenly and with no warning to his family or girlfriend.

If Aguilar's trial attorney had discussed immigration consequences with him before he pled guilty, the prosecutor might well have agreed to a different plea, as he was pleased by Aguilar's cooperation with police. It falls to this Court's assessment of *Padilla's* retroactivity to determine whether Aguilar can *try* to surmount the legal barriers to returning home.

**Emanuel Sumanariu also faces family**

separation.<sup>6</sup> A native of Romania, Sumanariu came to the United States as a teenager with his entire family in the diversity visa lottery. See 8 U.S.C. § 1153(c). Emanuel, his parents, and his sister have all lived in the United States as lawful permanent residents for fifteen years. As a teenager, Emanuel felt alienated as a “foreigner,” had a hard time adjusting to his new country, and made a few friends who were bad influences. He was arrested for using a stolen credit card in a Las Vegas casino. Sumanariu completed probation and paid restitution. In 2006, he started to become active in his church and got married. In the words of his wife, Alicia, he has “110%” turned his life around.

Sumanariu has been the sole provider for the family while Alicia, mother of his U.S. citizen child, attends nursing school. He has worked at the same job for nearly four years and received several promotions. Sumanariu has no family left in Romania—his parents, sibling, grandparents, uncles, and cousins are all legal residents of the United States. If deported, Sumanariu would leave behind another U.S. citizen child from a prior relationship for whom he provides child support. Cf. Jonathan Baum et al., *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* (2010).

Alicia also has a child from a previous relationship. If her husband is deported, Alicia faces an impossible choice: does she stay in the United States with her son from another father, or does she

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<sup>6</sup> This account is drawn from correspondence between *Amicus* and counsel for Sumanariu, as well as his wife and sister. All documentation is on file with counsel for *Amicus* and available at the Court's request.

take her child with Emanuel to Romania so they can live as a family?

Sumanariu was never told his offense could lead to deportation. On March 24, 2012, ICE arrested him. Sumanariu moved to withdraw his guilty plea, but the Nevada state court declined to defer ruling until this Court decides *Chaidez*. Sumanariu was ordered deported on June 21, 2012, and is currently in immigration detention. His wife fears losing the family home and being forced to file for bankruptcy. The children's health insurance has expired and Alicia relies on food stamps. *Chaidez* will control the future of this family.

**C. Because there is no statute of limitations on deportable offenses, *Padilla's* retroactivity is necessary for noncitizens convicted of low-level offenses without effective assistance of counsel to avoid being subject to deportation for the rest of their lives.**

There is no statute of limitations for deportation based on criminal offenses. Immigration officials can take years, and even decades, to initiate removal proceedings. Many longtime lawful residents of the United States therefore do not know that their convictions have rendered them deportable. For example, one 62-year-old barber from Ghana, who died in immigration detention in 2008, was in deportation proceedings based on a 1979 conviction for misdemeanor battery and retail theft. See Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N. Y. Times (Jan. 9, 2010).

These noncitizens include refugees and asylees,<sup>7</sup> who face persecution upon return to their countries of origin, parents and spouses of U.S. citizens, domestic violence survivors, and decorated veterans who have served in the United States military.

**Aban Nasir**<sup>8</sup> came to the United States from Iraq in 1974, when he was four years old, as a lawful permanent resident. Nasir's family is Chaldean Christian, a religious group that has long been persecuted in Iraq.<sup>9</sup> His first language is English. While he can speak some Chaldean, Nasir can neither read nor write it. He does not speak Arabic.

In 1991, when Nasir was 21, he pled guilty in Michigan to delivery of a controlled substance. His criminal defense attorney did not inform him of any immigration consequences that would result from the plea. That attorney has since been suspended by the Michigan Attorney Discipline Board and is no longer a member of the Michigan bar.

Nasir was ordered deported but remains in the United States, continuing to report to ICE on a regular basis. He lives daily with the stress of his

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<sup>7</sup> As an example, one Ethiopian refugee diagnosed with schizophrenia in high school was put in deportation proceedings after arrests for petty theft and loitering while he was homeless. See Catholic Legal Immigration Network, *Impact of Our Immigration Laws*, *supra*, at 41–42, 44.

<sup>8</sup> Aban Nasir is a pseudonym, as requested by his counsel, who has provided a signed letter attesting to counsel's review of the account of Nasir's case contained in this brief. This document is on file with counsel for *Amicus* and is available at the Court's request.

<sup>9</sup> Chaldean Christians in Iraq have fled violence en masse to surrounding countries. See, e.g., Nina Shea, 'Obliterating' Iraq's Christians, *Wash. Post* (May 14, 2010).



unknown future and cannot imagine a life in Iraq, separated from his entire family of U.S. citizens in a country completely foreign to him where he does not speak the language.

**Juan Lopez**,<sup>10</sup> a native of Cuba, came to the United States lawfully more than forty years ago, when he was 10. Like Jose Padilla, whose case the Court decided in 2010, Lopez is a decorated military veteran. He enlisted in the late 1970s and was honorably discharged in 1993. Lopez was so trusted by the U.S. government that he received secret clearance during the Cold War as part of a military police unit. He was selected as one of six men in his unit of 157 to attend a training exercise in West Germany just before the fall of the Berlin Wall.

Lopez received many honors during his years of service: the National Defense Service Medal; the Army Achievement Medal; the Army Reserve Achievement Medal; the Humanitarian Service Medal (Hurricane Andrew); the Overseas Medal; the Florida Achievement Medal; and the Armed Forces Reserve Medal are among his awards.

Twenty-five years ago, Lopez was arrested and charged with a one-time sale of cocaine after a friend who turned out to be an informant asked him to help with the sale. Lopez describes the incident as a huge mistake that he has regretted ever since, as it has "been a cloud over the person that I am. I should have known better."

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<sup>10</sup> Juan Lopez is a pseudonym, as requested by his counsel, who has provided a signed letter attesting to counsel's review of the account of Lopez's case contained in this brief. This document is on file with counsel for *Amicus* and is available at the Court's request.



Lopez pled guilty and served six months of house arrest. He continued in the Reserves after his plea. His defense attorney never told Lopez that he could be deported for the conviction, and the transcript from his plea colloquy indicates that she and the sentencing judge believed Lopez not to be deportable.

In 2010, Lopez filed for post-conviction relief. Many people in his life know of his conviction and accept his rehabilitation, including a police officer who is also the pastor of his church. Deeply devoted to this country, Lopez attests that he “was willing to defend this country and put my life on the line for this country. I’m not a citizen, but I am an American.” He knows little about Cuba and can barely remember it.

Lopez’s entire family is in the United States, including his wife, four U.S. citizen daughters, and five U.S. citizen grandchildren. His wife is a teacher, and his daughters are a nursing student, a police officer, a police spokesperson, and a manager at a veterinary clinic. He has been at his current job for twenty years.

After several emotional hearings, the state court judge thanked Lopez for his service to the United States and remarked it was ridiculous that the federal government received the benefit of Lopez’s sacrifice and bravery for so many years only to subject him to possible deportation.<sup>11</sup> The resolution of Lopez’s immigration case hinges on whether *Padilla* is retroactive.

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<sup>11</sup> Juan Lopez is far from the only former soldier to be vulnerable to deportation. See generally *Banished Veterans*, <http://www.banishedveterans.info/index.html>.

There is no distinction between pre-*Padilla* and post-*Padilla* convictions other than their timing. Jose Padilla was convicted in 2002, before Aguilar and Sumanariu. Roselva Chaidez applied for relief before *Padilla*. See *Chaidez v. United States*, 655 F.3d 684, 686 (7th Cir. 2011). Noncitizens like Chaidez and those described in this brief who received constitutionally ineffective assistance of counsel deserve the same avenue of potential redress that Jose Padilla was rightly accorded.

**D. In cases where defendants received ineffective assistance of counsel, affirming *Padilla*'s retroactivity will allow defendants to make informed decisions about the consequences of pleading guilty or going to trial, as the Constitution requires.**

A holding that *Padilla* is retroactive does not mean relief will be granted to all those who received ineffective assistance of counsel regarding the immigration consequences of their plea agreements. Not all motions to vacate a conviction are successful, as many movants fail to satisfy the *Strickland* test. See, e.g., *Zapata-Banda v. United States*, Nos. B:10–256, B:09–PO–2487 2011 WL 1113586 (S.D. Tex. Mar. 7, 2011); *United States v. Marroquin*, No. M–10–156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011); *Luna v. United States*, No. 10CV1659 JLS (POR), 2010 WL 4868062 (S.D. Cal. Nov. 23, 2010); *Kokobani v. United States*, Nos. 5:06–cr–207, 5:08–cv–177, 2010 WL 3941836 (E.D.N.C. Jul. 30, 2010);

*Boakye v. United States*, No. 09 Civ. 8217, 2010 WL 1645055 (S.D.N.Y. Apr. 22, 2010).

In other cases, however, *Padilla*'s retroactivity would provide relief for deserving, rehabilitated individuals. For example, **Andy Song**, a lawful permanent resident, was arrested in 1995 for receiving shipments of fake brand-name items, including NFL jackets and Louis Vuitton purses.<sup>12</sup> Song was in South Korea visiting his mother when he heard of the indictment. He immediately boarded a flight home to answer the charges, and then turned himself in. Song entered a guilty plea in 1998, served six months of house arrest, and paid restitution.

Song returned to his life with his U.S. citizen wife and two U.S. citizen daughters. But, in 2002, ICE initiated removal proceedings. See *Song v. United States*, Nos. CV-09-5184-DOC; CR-98-0806-DOC, 2011 WL 2533184 (C.D. Cal. June 27, 2011), \*1. Song's attorney had not informed him that his guilty plea to a fraud offense for which loss to the victims was over \$10,000 created a deportable offense. In 2006, an immigration judge ordered Song deported to South Korea.

Song filed a writ of *coram nobis* in the U.S. District Court for the Central District of California. His former public defender, upon hearing the effect of his ineffective assistance on Song, volunteered to testify that he made a mistake in failing to inform Song of the guilty plea's consequences. The district court concluded that *Padilla* is retroactive and

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<sup>12</sup> Counsel for Song has provided a signed letter attesting to counsel's review of the account of Song's case contained in this brief. This document is on file with counsel for *Amicus* and is available at the Court's request.

applicable to Song's 1998 conviction. At the time of his original plea agreement, Song was therefore deprived of his constitutional right to make an informed decision about its consequences. *Id.* at \*4.

Song's current counsel negotiated a new plea agreement with the U.S. Attorney's Office, in which Song pled guilty to fraud with loss to the victims under \$10,000, thereby removing the conviction from the ambit of deportable offenses. The government acknowledged that Song is not a danger to the community and confirmed his payment of restitution.

Indeed, Song has worked seven days a week in the donut shop he has owned since 1997, to repay his debt to society, to provide for his family, and to send his U.S. citizen daughters to college. His elder daughter, 19, is a sophomore studying business at the University of California, Irvine. His younger daughter, 17, graduated from high school this year and starts as an art major at Boston College in the fall of 2012. Song's family's future as an intact American family depended on *Padilla* having retroactive effect.

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Cases like those described in this brief underscore the vital importance of *Padilla*'s retroactivity for dedicated members of American communities nationwide and their mixed-status families including U.S. citizen spouses and children. *Padilla* violations have caused some people charged with low-level crimes and possessing strong equities to be subject to deportations that would not have occurred in a properly functioning, fully informed, and constitutionally compliant criminal justice

system. The convictions in these cases were obtained in a manner that offends the Constitution and, whether or not the individuals affected ultimately achieve relief from deportation, each deserves an opportunity to make an informed decision in response to the criminal charges brought against him or her.

## CONCLUSION

*Amicus* respectfully urges the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,  
IRA J. KURZBAN  
*Counsel of Record*

KURZBAN, KURZBAN, WEINGER,  
TETZELI & PRATT, P.A.  
2650 S.W. 27<sup>th</sup> Avenue  
Miami, Florida 33133  
(305) 444-0060  
ira@kkwtlaw.com

DEBORAH S. SMITH

LAW OFFICE OF  
DEBORAH S. SMITH  
7 West Sixth Avenue, Suite 4M  
Helena, Montana 59601

(406) 461-6709  
deb@debsmithlaw.com

REBECCA SHARPLESS

Immigration Clinic  
University of Miami School of Law  
1311 Miller Drive, E273  
Coral Gables, Florida 33146  
(305) 284-3576  
rsharpless@law.miami.edu

*Attorneys for Amicus Curiae*

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**AMICUS  
CURIAE  
BRIEF**

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IN THE  
Supreme Court of the United States

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ROSELVA CHAIDEZ,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

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KENT S. SCHEIDEGGER  
Criminal Justice Legal Fdn.  
2131 L Street  
Sacramento, CA 95816  
(916) 446-0345  
briefs@cjlff.org

*Attorney for Amicus Curiae  
Criminal Justice Legal Foundation*

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held (1) that the Sixth Amendment imposes on attorneys representing noncitizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea, and (2) that a criminal judgment may be overturned for a breach of that duty.

The question presented is whether, under the retroactivity framework established in *Teague v. Lane*, 489 U. S. 288 (1989), *Padilla* announced a new rule that does not apply retroactively to convictions that became final before *Padilla* was decided.



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IN THE  
Supreme Court of the United States

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ROSELVA CHAIDEZ,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICUS CURIAE**

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The petitioner in the present case seeks to open new avenues for challenging criminal judgments entered

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.



long ago by creating new exceptions to this Court's jurisprudence on the retroactivity of new rules of criminal procedure. These rules protect the interests of victims of crime in finality by preventing the overturning of convictions that were properly obtained under the rules in effect at the time of the original trial based on later developments in case law. This body of law has been established over many years to provide the correct balance between the rights of defendants and those of victims. Unsettling this law and creating new exceptions is unnecessary and is contrary to the rights of victims of crime that CJLF was formed to protect.

### SUMMARY OF FACTS AND CASE

Petitioner Roselva Chaidez is a citizen of Mexico and was granted legal permanent resident status in the United States in 1977. See Brief for Petitioner 2. In 1998, she engaged in a scheme to defraud an insurance company by falsely claiming to have been injured in an automobile accident. See Brief for the United States 2-3. The company paid a total of \$26,000 on claims in the scheme, including an \$11,000 check to petitioner and her attorney. See *id.*, at 3.

Petitioner pleaded guilty to two counts of mail fraud in December 2003 and was sentenced to four years probation. See Pet. App. 31a (District Court opinion). In 2009, after petitioner filed a naturalization petition stating she had never been convicted of a crime, the government commenced removal proceedings. Pet. App. 32a. On October 11, 2009, petitioner filed a petition for writ of error coram nobis claiming that her trial counsel, Kaaren Plant, had not informed her of the immigration consequences of her plea. Pet. App. 32a-33a. Plant died two months later, before the government could interview her. Pet. App. 34a.

Although the petition was filed five years after the judgment became final, the District Court stated summarily that a petition for writ of error coram nobis was not subject to a statute of limitations, citing pre-AEDPA<sup>2</sup> authority. Pet. App. 34a-35a.

The District Court found that *Padilla v. Kentucky*, 559 U. S. \_\_\_, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), was not a “new rule” barred from retroactive application by the rule of *Teague v. Lane*, 489 U. S. 288 (1989). See Pet. App. 52a. Following an evidentiary hearing, the District Court granted relief and vacated the conviction. See Pet. App. 38a.

The government appealed only on the retroactivity holding. See Brief for Petitioner 6. The Court of Appeals for the Seventh Circuit reversed on this ground in a split decision. Pet. App. 18a-19a.

## SUMMARY OF ARGUMENT

The rule of *Teague v. Lane*, limiting the retroactivity of new rules of criminal procedure in cases already final, applies equally to state and federal judgments. The *Teague* opinion expressly defines “new rules” as those placing new burdens on the Federal Government as well as the States. It endorsed the view of retroactivity first advanced by Justice Harlan, which expressly applied to both. It has been regularly applied in federal cases in the Federal Courts of Appeals and once in this Court.

Determining whether a rule is new for the purpose of *Teague* requires a survey of the legal landscape before the case announcing the rule. When this Court has not squarely ruled on an issue, the required survey

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2. The Antiterrorism and Effective Death Penalty Act of 1996.

must include decisions of state courts and lower federal courts. Prior to *Padilla v. Kentucky*, the precedents were overwhelmingly contrary. The *Padilla* rule is a discrete question of law, not a fact-intense examination of a particular case, and therefore different in kind from prior ineffective assistance cases that were applications of *Strickland v. Washington* rather than new rules.

The American Bar Association is a private organization with no authority to change the requirements of the Sixth Amendment. Its views are entitled to little or no weight when there is ample judicial authority to the contrary.

The government did not appeal the decisions of the District Court that *coram nobis* is available in the circumstances of this case and, implicitly, that it can be used when a § 2255 motion would be barred by the statute of limitations. These important questions should be expressly reserved for a case where they are properly presented.

No exception to the *Teague* rule should be made for ineffective assistance claims. The vast majority of such claims seek to apply *Strickland*, not make or apply new rules, and the *Teague* rule is not an obstacle. For the rare case where a defendant seeks to make or apply a new rule, a § 2255 motion should be permitted concurrently with the appeal.

## ARGUMENT

### **I. This Court's retroactivity jurisprudence applies equally to state and federal cases.**

#### *A. The Teague Opinion and the Harlan Foundation.*

"In general, . . . , a case announces a new rule when it breaks new ground or imposes a new obligation on

the States or the Federal Government.” *Teague v. Lane*, 489 U. S. 288, 301 (plurality opinion) (emphasis added).<sup>3</sup> “Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” *Id.*, at 310. Neither exception draws any distinction between state and federal cases. See *id.*, at 311.

In the present case, petitioner and supporting *amici* make the remarkable assertion that the *Teague* opinion does not mean what it plainly said.<sup>4</sup> *Padilla* imposed on the Federal Government a new obligation to ensure that the defendant has received adequate legal advice regarding collateral immigration consequences before pleading guilty, and petitioner argues that rule will apply to overturn convictions that became final at a time when the law was almost universally understood to be contrary. The understanding of two decades of retroactivity jurisprudence, uniformly followed to that point in every Federal Court of Appeals and implicitly recognized in this Court, see *infra* at 10, is said to be

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3. Parts IV and V of Justice O'Connor's opinion in *Teague*, the parts relevant to this case, are a plurality opinion because Justice White chose to make one last stand on behalf of the prior approach to retroactivity, discussed below, which by then had already been abandoned for direct review. See *id.*, at 316-317 (opinion concurring in part and concurring in judgment). He came on board four months later. See *Penry v. Lynaugh*, 492 U. S. 302, 313 (1989) (opinion of the Court by O'Connor, J., joined in Part II-A by Rehnquist, C. J., and White, Scalia, and Kennedy, JJ.). The *Teague* plurality opinion has been treated as the definitive precedent ever since.
  4. Petitioner seems to start off arguing that *Teague* does not apply at all to federal collateral challenges, see Brief for Petitioner 27, and then slides into a more nuanced argument that an exception should be made for this particular type of challenge. See Brief for Petitioner 30-33. See also *infra*, at 12.

unsettled by *dicta* in one opinion where the question was not presented by the case then before the Court. See *Danforth v. Minnesota*, 552 U. S. 264, 269, n. 4 (2008). *Stare decisis* should be made of sterner stuff.

To understand how far-fetched petitioner's position is, it is important to place *Teague* in its context in the development of the law of retroactivity. Nonretroactivity in constitutional criminal procedure made its debut during the Warren Court era, when this Court was rapidly creating rules that certainly were not in the Bill of Rights as originally understood. See, e.g., *Mapp v. Ohio*, 367 U. S. 643 (1961); *Miranda v. Arizona*, 384 U. S. 436 (1966). In *Linkletter v. Walker*, 381 U. S. 618, 622-627 (1965), the Court rejected the Blackstonian view that retroactivity was required because judges only discover, not make, law. Instead, *Linkletter* held "that in appropriate cases the Court may in the interest of justice make the rule prospective." *Id.*, at 628.

Under the *Linkletter* scheme, the criteria for deciding whether a new rule would apply retroactively did not differ between state and federal courts, although the determination of whether the rule was actually new might be different in the "incorporation" era. In *Linkletter*, the nonretroactivity of *Mapp* was limited to the States because the Fourth Amendment exclusionary rule was not new for federal courts. See *Linkletter*, 381 U. S., at 619, 639. In *Johnson v. New Jersey*, 384 U. S. 719 (1966), on the other hand, the rules of *Miranda* and *Escobedo v. Illinois*, 378 U. S. 478 (1964), were new for both state and federal courts, and the retroactivity problem was the same for both. The same day the Court decided *Johnson*, it denied certiorari in a list of *Miranda* cases, state and federal alike, over Justice



Douglas's retroactivity-based dissent. See, e.g., *Robinson v. United States*, 384 U. S. 1024 (1966).<sup>5</sup>

Justice Harlan originally concurred in this approach, "because I thought it important to limit the impact of constitutional decisions which seem to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought." *Desist v. United States*, 394 U. S. 244, 258 (1969) (dissenting opinion). His thesis was that new rules should be fully retroactive on direct review, see *ibid.*, while on collateral review, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.*, at 263. Justice Harlan expanded on his thesis in *Mackey v. United States*, 401 U. S. 667, 675-702 (1971) (opinion concurring in the judgment in two cases and dissenting in one).

*Desist* and *Mackey*, as their names imply, were federal-prisoner collateral reviews under 28 U. S. C. § 2255. In both cases, the opinion of the Court applied the *Linkletter* and *Johnson* precedents to these federal prisoners with no indication of any distinction on that basis. See *Desist*, 394 U. S., at 248-254 (applying *Linkletter* and *Stovall v. Denno*, 388 U. S. 293 (1967)); *Mackey*, 401 U. S., at 674-675 (applying *Johnson*). Justice Harlan was even more explicit on this point:

"I realize, of course, that state prisoners are entitled to seek release via habeas corpus under 28 U. S. C. § 2241, while federal prisoners technically utilize what is denominated a motion to vacate judgment under 28 U. S. C. § 2255. However, our cases make these remedies virtually congruent and

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5. The full list with the dissent is on pages 1020-1025.



the purpose of substituting a motion to vacate for the traditional habeas action in the federal system was simply to alter one minor jurisdictional basis for the writ. See *United States v. Hayman*, 342 U. S. 205 (1952). *As I do not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief*, I shall refer throughout this opinion to both procedures as the writ of habeas corpus, and cases before us involving such judgments as *cases here on collateral review*." *Mackey*, 401 U. S., at 681-682, n. 1 (emphasis added).

In *Danforth*, the opinion of the Court notes that Justice Harlan's opinions in *Desist* and *Mackey* "provided the blueprint for [Justice O'Connor's] entire analysis" in the *Teague* plurality opinion. See 552 U. S., at 277. That is correct. Justice Harlan is mentioned 17 times in Part IV of *Teague*, and the conclusion of that part is "we now adopt Justice Harlan's view of retroactivity for cases on collateral review." *Teague*, 489 U. S., at 310. That view is based entirely on finality, not federalism, applies equally to state and federal prisoners, and expressly uses the term "collateral review" to include motions under § 2255.

Yet two pages later, the *Danforth* opinion incorrectly and inexplicably states "the text and reasoning of Justice O'Connor's opinion also illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions *challenging state-court criminal convictions*," 552 U. S., at 279 (emphasis added), apparently unaware of the contradiction. But the text and reasoning do not by any means exclude application to federal prisoners.

Part IV-A of *Teague* traces the criticisms of the *Linkletter* rule, including its inconsistency and "disparate treatment of similarly situated defendants,"

leading to its rejection for direct review in *Griffith v. Kentucky*, 479 U. S. 314, 323 (1987). See *Teague*, 489 U. S., at 302-305. These considerations are the same for state and federal cases. Then in Part IV-B, the *Teague* plurality discussed and “agree[d] with Justice Harlan’s description of the function of habeas corpus.” *Id.*, at 305-308. As noted in the passage from *Mackey* quoted above, that description was exactly the same for state and federal prisoners. In this context, the plurality discusses the importance of finality in terms that make no distinction between state and federal cases. “Without finality, the criminal law is deprived of much of its deterrent effect.” *Id.*, at 309. The opinion quotes from Judge Friendly’s famous article, see *ibid.*, the “chief concern” of which “is about the basic principle of collateral attack, rather than with the special problem of federal relief for state prisoners . . . .” Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146 (1970).

The opinion mentions costs imposed on the States from retroactive application of new rules, see *Teague*, 489 U. S., at 310, but those same costs are borne by the Federal Government. The mere fact that the opinion does not expressly say “or the Federal Government” every time, having already said it once, cannot plausibly be read to exclude federal cases that are so clearly in the body of jurisprudence on which the opinion is based. Cf. *Holland v. Jackson*, 542 U. S. 649, 654-655 (2004) (*per curiam*). The problem of continually marshaling resources to defend old judgments noted by *Teague*, see *ibid.*, is illustrated by the present case. The District Court suggested that the government could have spent investigative resources to find alternatives to the testimony of the deceased trial attorney. See Pet. App. 38a. Those resources are limited and needed for new cases.

Petitioner claims that the *Teague* rule “is motivated in part by ‘comity’ considerations,” Brief for Petitioner 28, but in fact *Teague* only mentions comity once in a paragraph about limitations on habeas relief generally. See 489 U. S., at 308. Again, this passing mention cannot plausibly be construed to limit *Teague* to state cases in light of the fact that it is expressly based on a theory that expressly includes federal cases.

In summary, both the *Teague* opinion itself and its antecedents clearly indicate that its rule applies equally to state-prisoner and federal-prisoner collateral attacks in federal courts. There was little doubt of that at the time *Teague* was decided, and prior to *Danforth*’s ill-considered *dicta* both this Court and the Federal Courts of Appeals so understood it.

#### *B. Bousley.*

Petitioner claims that “this Court thus far has applied *Teague* only to state convictions . . . .” Brief for Petitioner 5, citing *Danforth*, 552 U. S., at 269, n. 4. The *Danforth* footnote does not say that, and in fact it is not true.

In *Bousley v. United States*, 523 U. S. 614 (1998), this Court granted certiorari to consider the retroactivity on collateral review of *Bailey v. United States*, 516 U. S. 137 (1995), regarding what it means to “use” a firearm. See *Bousley*, *supra*, at 617-618. The *amicus* appointed by this Court to defend the judgment below argued that Bousley’s “motion for relief under § 2255 is barred by the doctrine of *Teague v. Lane*, 489 U. S. 288 (1989), which precludes application of new criminal rules on collateral review of convictions that became final before the rules were announced.” See Brief *Amicus Curiae* in Support of the Judgment in *Bousley v. United States*, No. 96-8516, Summary of the Argument. The claim that *Teague* applies only to state

prisoners and not to federal prisoners' petitions under § 2255 was made to the Court in two *amicus* briefs. See Brief *Amicus Curiae* for American Civil Liberties Union in *Bousley v. United States*, No. 96-8516, p. 16; Brief for National Association of Criminal Defense Lawyers and Families against Mandatory Minimums Foundation as *Amici Curiae* in *Bousley v. United States*, No. 96-8516, p. 11.

The *Bousley* Court applied the *Teague* jurisprudence exactly as it would have in a state-prisoner case. *Bousley*'s claim was not *Teague*-barred because of the "distinction between substance and procedure . . . ." 523 U. S., at 620. A decision of this Court narrowing the scope of a federal criminal statute applies retroactively under the *Teague* rule for the same reason that a decision declaring a substantive statute unconstitutional would apply retroactively. See *ibid.* (quoting *Teague*, 489 U. S., at 311, in turn quoting *Mackey*, 401 U. S., at 692).<sup>6</sup> That is, there is "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Ibid.* (quoting *Davis v. United States*, 417 U. S. 333, 346 (1974).) In other words, the *Bailey* rule qualified for the "first exception" to the *Teague* rule. See *Penry v. Lynaugh*, 492 U. S. 302, 329-330 (1989) (expanding the first exception). This discussion would have been completely superfluous if the *Teague* rule did not apply to federal prisoners at all. The *Bousley* Court evidently considered the applicability of *Teague* to § 2255 petitions generally to be so clear as to not even require discussion, even though the argument had been placed before the Court.

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6. *Bousley* quotes *Teague* quoting the same passage of *Mackey* twice on page 620. Justice Harlan's examples of substantive rules included *Griswold v. Connecticut*, 381 U. S. 479 (1965) (contraceptives) and *Loving v. Virginia*, 388 U. S. 1 (1967) (interracial marriage). See *Mackey*, 401 U. S., at 692, n. 7.

*C. Universal Application in the Courts of Appeals.*

Multiple briefs have been submitted to this Court arguing that the *Teague* rule does not apply to collateral reviews of federal convictions. See Brief for Petitioner 27-30;<sup>7</sup> Brief *Amici Curiae* of Habeas Scholars<sup>8</sup> and Constitutional Accountability Center 6-8; Brief *Amicus Curiae* of National Association of Federal Defenders 7-8. Curiously absent from these briefs is any citation of a single court of appeals opinion so holding. That is because the cases are uniformly to the contrary.

The language and lineage of *Teague*, discussed above, makes its application to § 2255 cases so obvious that little discussion has been needed. While petitioner commentators may lament that the issue has been “ignored by most courts and commentators,” see 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 25.6, p. 1381 (6th ed. 2011), the reality is simply that the question is straightforward. See, e.g., *Gilberti v. United States*, 917 F. 2d 92, 94-95 (CA2 1990) (dispatching the question in two paragraphs, based on language of opinion, descent from *Mackey*, and inadequacy of prior *Linkletter* approach).

The clarity of the understanding that *Teague* applies to § 2255 cases can be seen in the Courts of Appeals’ reactions to the upending of federal sentencing in *United States v. Booker*, 543 U. S. 220 (2005). Within months, Federal Courts of Appeals applied a straightforward *Teague* analysis—new rule, neither exception—to find *Booker* not retroactive to cases already

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7. See *supra* note 4.

8. The fashion in recent years of groups of *amici* filing under self-important, ad hoc group names warrants some kind of corrective action from the Court.



final. See, e.g., *Humphress v. United States*, 398 F. 3d 855, 860-863 (CA6 2005); *Guzman v. United States*, 404 F. 3d 139, 141-144 (CA2 2005). This Court did not decide whether *Teague* barred *Booker* claims in cases already final because it did not need to. The Federal Courts of Appeals were unanimous. See *United States v. Cruz*, 423 F. 3d 1119, 1120 (CA9 2005) (*per curiam*) (“We now join every other circuit . . .”).

The notion that a question of this magnitude has simply been overlooked all these years, while *Teague* has been routinely applied to deny § 2255 claims, is absurd on its face. The applicability of *Teague* to federal collateral attacks is settled law.

#### *D. Absence of an Alternative.*

While claiming that *Teague* does not apply to collateral attacks on federal convictions, petitioner and supporting *amici* fail to offer any alternative. If not *Teague*, then what? Given *Teague*’s scathing review of the *Linkletter* jurisprudence, see 489 U. S., at 302-305, the Court surely could not have intended to keep that line of cases in force. No one could seriously propose going all the way back to the situation before *Linkletter*, with full retroactivity on collateral review of every new rule. Congress clearly expected a limit on retroactivity, and a stringent one at that, when it created an alternate starting date for the collateral review statute of limitations in 28 U. S. C. § 2255(f)(3) (2006 ed. Supp. IV 2010). If any and all new rules of criminal procedure were going to be retroactive to final judgments, Congress would surely have limited the new rules that could restart this clock.

*Teague* is a settled body of jurisprudence applied by the federal courts in federal prisoner cases for 23 years now. If it is suddenly held not to apply and if neither of the prior approaches is viable, then the only alternative



would be to establish a whole new retroactivity scheme from scratch. There is no justification for such a wholesale unsettling of the law. Collateral attack on a final conviction is a drastic measure, and *Teague* appropriately reserved the application of new rules in such circumstances to the cases where they are most necessary. This body of jurisprudence should stand as it has been understood for two decades. *Teague* applies to collateral attacks on federal judgments exactly as it applies to collateral attacks on state judgments.

**II. The required “survey of the legal landscape” before *Padilla* demonstrates conclusively that *Padilla* is a “new rule” for the purpose of *Teague*.**

*A. The Newness of Padilla.*

This Court’s jurisprudence on what constitutes a “new rule” for the purpose of *Teague* has not been a model of clarity or consistency. For example, looking back at *Penry v. Lynaugh*, 492 U. S. 302 (1989), through the lens of the stricter definitions of “new rule” in later cases such as *Butler v. McKellar*, 494 U. S. 407 (1990) (quoted below), it is apparent that the four dissenters had the better of the argument. See *Penry*, *supra*, at 355-356 (Scalia, J., dissenting). Indeed, the difficulty of distinguishing new rules from applications of old rules in the *Teague* cases was very likely one of the reasons that Congress expressly included applications when it drafted 28 U. S. C. § 2254(d)(1). This case, however, is not difficult. The *Teague* line of cases does have some guideposts and methods, and they readily resolve the “new rule” question in this case.

The simplest case of a new rule under *Teague* is when this Court overrules its own precedent. Such an

overruling creates a new rule beyond any doubt. See *Whorton v. Bockting*, 549 U. S. 406, 416 (2007).

The evolution of the law does not always come from explicit overrulings of decisions on point, however. Change also comes when this Court rules on a point of law that it has not expressly addressed but which has been actively considered in the other courts of the country. The question under *Teague* is whether the result was “dictated by precedent existing at the time the defendant’s conviction became final.” *Teague*, 489 U. S., at 301 (emphasis in original). “[T]he court must ‘[s]urve[y] the legal landscape as it then existed,’” *Caspari v. Bohlen*, 510 U. S. 383, 390 (1994) (quoting *Graham v. Collins*, 506 U. S. 461, 468 (1993)), and when this Court’s precedents are not squarely on point, the opinions of other courts must be included in the survey.

“But the fact that a court says that its decision is within the ‘logical compass’ of an earlier decision, or indeed that it is ‘controlled’ by a prior decision, is not conclusive for purposes of deciding whether the current decision is a ‘new rule’ under *Teague*. Courts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In *Roberson*, for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U. S., at 679, n. 3. That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decide

that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a ‘new rule.’ ” *Butler v. McKellar*, 494 U. S., at 415 (emphasis added).

*Butler* involved the extension of an existing rule into new territory, *i.e.*, the application of the “don’t ask again” rule of *Edwards v. Arizona*, 451 U. S. 477 (1981), to the case of a person who has invoked his right to counsel during questioning with regard to a different offense. See *Arizona v. Roberson*, 486 U. S. 675, 682 (1988). *Caspari*, 510 U. S., at 386, involved a similar extension, whether the double-jeopardy rule of *Bullington v. Missouri*, 451 U. S. 430 (1981), should be extended to noncapital sentencing. The survey showed that state courts of last resort and the Federal Courts of Appeals were deeply divided. *Caspari, supra*, at 393-394. “Because that conflict concerned a ‘developmen[t] in the law over which reasonable jurists [could] disagree,’ *Sawyer v. Smith*, 497 U. S. 227, 234 (1990), the Court of Appeals erred in resolving it in [the habeas petitioner’s] favor.” *Id.*, at 395.

In other words, if this Court has not decided whether precedent X extends to new situation Y, the issue has been considered in many courts at the next level down, and those courts are deeply divided, the extension is (or would be) a new rule. Petitioner cites *Beard v. Banks*, 542 U. S. 406, 416, n. 5 (2004), for the proposition that the “mere existence of a dissent” is not conclusive, but that case holds that a 5-4 division and strong dissent in the precedent establishing the rule was strong evidence that the rule was not dictated by precedent. See *id.*, at 415. Similarly, petitioner criticizes the Court of Appeals’ reference to “the state of the law in the lower courts” in the present case. See Brief for Petitioner 22. Under *Butler*, *Graham*, *Caspari*, and *O’Dell v. Nether-*

land, 521 U. S. 151, 166, n. 3 (1997), that reference was not only proper, it was mandatory.

The *Teague* test is objective, and even reasonable jurists occasionally render decisions that appear unreasonable in retrospect.<sup>9</sup> But as the number holding a particular view grows, the probability that the contrary view is “dictated by precedent” shrinks inverse-exponentially to infinitesimal. If the survey shows many opinions and a deep division, the rule is new. *A fortiori*, if the survey shows many opinions and the overwhelming weight of authority *against* the rule in question, the rule is certainly new.

The survey result in the present case is clear.

“The Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction. [Footnote: See *Brady v. United States*, 397 U. S. 742, 755 (1970).] The extension of this principle to defense counsel’s duties under the Sixth Amendment, although never passed upon by the Supreme Court, is nevertheless *among the most widely recognized rules of American law*.” Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 706 (2002) (emphasis added).

Chin and Holmes count all but one of the Federal Courts of Appeals and courts in 35 states and the District of Columbia in support of this rule. *Id.*, at 707-708; see also *id.*, at 699. Only four state court decisions were contrary, “some possibly on state law grounds.”

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9. “‘I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.’” *McGrath v. Kristensen*, 340 U. S. 162, 178 (1950) (Jackson, J., concurring) (quoting Lord Westbury).

*Id.*, at 708. Updating the survey to the time of the *Padilla* certiorari petition, Professor Stephanos Bibas, representing *amici* supporting *Padilla*, could muster only three cases for an affirmative constitutional duty to advise, and the overwhelming weight of authority remained to the contrary. See Brief for Capital Area Immigrants' Rights Coalition et al. as *Amici Curiae* in Support of the Petition for Certiorari in *Padilla v. Kentucky*, No. 08-651, Part I-A.<sup>10</sup>

In an attempt to avoid the obvious result of the required survey of the legal landscape, petitioner relies on Justice Kennedy's concurrence in the judgment in *Wright v. West*, 505 U. S. 277, 309 (1992): "Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." That is indeed true, and *Strickland v. Washington*, 466 U. S. 668 (1984), is indeed such a rule, but Justice Kennedy said "infrequent," not "nonexistent." *Padilla* is the infrequent case.

All of the other *Strickland* cases cited by petitioner, see Brief for Petitioner 15-19, involved attacks on the performance of trial or appellate counsel which the habeas petitioner claimed resulted in a conviction he should not have received or a sentence more harsh than he should have received. Collateral consequences are different in kind, not just in degree.

Certainly one could not plausibly argue that a convicted felon could have his guilty plea and judgment set aside for failure to advise him of any and all collat-

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10. The government compiles a slightly different count, but the difference is not material. See Brief for United States 12-17.



eral consequences. Could a son who murdered his rich father and plea-bargained down to manslaughter have that plea overturned because his lawyer misadvised him that he could thereby inherit the estate? See 14 B. Witkin, *Summary of California Law, Wills and Probate* § 293, pp. 380-381 (10th ed. 2005). Could a guilty plea in a murder case be overturned for counsel's failure to tell the defendant he would not be able to vote in prison? See *Hayden v. Pataki*, 449 F. 3d 305, 309 (CA2 2006) (en banc).

Before *Padilla*, the rule in most jurisdictions was to draw a bright line between collateral and direct consequences. See Chin & Holmes, *supra*, 87 Cornell L. Rev., at 699. *Padilla* moved the line to include what is probably the most severe collateral consequence known to American law: deportation. This is a discrete change in the territory covered by the *Strickland* rule. It is quite unlike *Wiggins v. Smith*, 539 U. S. 510 (2003). See Brief for Petitioner 18. Petitioner claims *Wiggins* "broke new ground" by applying *Strickland* to counsel's duty to investigate background evidence for the penalty phase as opposed to failure to present character and psychological evidence in the penalty phase in *Strickland*. But this was nothing new. Courts throughout the country had been applying *Strickland* to failure-to-investigate claims for many years. See, e.g., *Buenoano v. Singletary*, 963 F. 2d 1433, 1437-1438 (CA11 1992); *Siripongs v. Calderon*, 35 F. 3d 1308, 1313-1314 (CA9 1994). Unlike the amorphous question of whether counsel's efforts to avoid a death sentence in a particular case were adequate, *Padilla* involved the discrete question of law regarding whether misadvice or failure to advise on a particular collateral consequence was a ground to set aside a guilty plea.

Petitioner asks this Court to revisit an argument it rejected 22 years ago. She asks the Court to define



“new rule” at such a high level of generality as to render *Teague* meaningless. See *Sawyer v. Smith*, 497 U. S. 227, 236 (1990). The Court rejected that argument then, and it should reject that argument again.

#### *B. ABA Standards.*

Against the overwhelming weight of pre-*Padilla* judicial authority, an *amicus* brief puts forth professional standards of the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA). See Brief for *Amici Curiae* National Association of Criminal Defense Lawyers et al. 6-18. Statements in opinions of this Court referring to such standards as “guides,” even with the caveat that they are “only guides,” have been the source of much mischief. See, e.g., *Bobby v. Van Hook*, 558 U. S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255, 259 (2009) (*per curiam*); *id.*, 130 S. Ct., at 20, 175 L. Ed. 2d, at 262-263 (Alito, J., concurring). It is time to reconsider and disclaim them.

The people of the United States have not delegated to the ABA the power to amend the Sixth Amendment or to review the decisions of the Courts of Appeals construing that amendment. The first power is reserved to the people through the amendment process, see U. S. Const., art. V, and the second is reserved to this Court. See 28 U. S. C. § 1254 (2006 ed.).

As the government has explained, these kinds of standards are often “aspirational.” Brief for the United States 30. There is considerable difference between the standard that a professional organization aspires to and the minimum acceptable under the Constitution. Indeed, it would be a sad commentary on an organization if it did not aspire to better than the minimum.

Allowing a private organization of lawyers to change the constitutional minimum is especially problematic when that minimum involves the expenditure of government resources. Given the reality that a large portion of defendants are indigent and entitled to appointed counsel, any rule that expands what counsel must do necessarily transfers funds from the public at large into the pockets of lawyers. The ABA has no responsibility for the myriad other demands on the limited resources of government, and it is free to promulgate aspirational standards without fiscal consequences. Legislatures do not have that luxury. If a requirement is read into the Constitution, then the cost of complying with it moves to the head of the line, ahead of other important but nonconstitutional government functions. An organization of lawyers has a conflict of interest with regard to the question of whether funding legal services is more important than funding education, police, national defense, health care, or other priorities.

The California Supreme Court, in a recent, unanimous decision, rejected use of ABA guidelines for capital cases where they were not consistent with the controlling judicial precedents, including *Jones v. Barnes*, 463 U. S. 745 (1983). See *In re Reno*, No. S124660 (Cal. Aug. 30, 2012) (slip op., at 36-40). This Court should similarly reject the notion that the ABA could change the constitutional minimum in force before *Padilla* when the overwhelming weight of *judicial* authority was to the contrary. *Padilla* was “new” based on the survey of the legal landscape, as described in the previous section, and statements of private organizations cannot change that status.

### III. The coram nobis and statute of limitations questions lurking in this case should be expressly reserved.

Petitioner's conviction became final in 2004, and she moved to set it aside in 2009. Congress thought it precluded such actions, with rare exceptions, when it enacted the collateral review statute of limitations in 1996, 28 U. S. C. § 2255(f).<sup>11</sup>

Petitioner could not proceed under § 2255 if she were still in custody. If *Padilla* is a new rule, the claim is *Teague*-barred.<sup>12</sup> If *Padilla* is not a new rule, paragraph (3) of § 2255(f) is inapplicable, paragraph (1) has expired, and there is no claim that paragraphs (2) or (4) applies. Because she is not in custody, however, petitioner filed a petition for writ of error coram nobis.

Whether the writ of error coram nobis can be used at all in this situation and whether it can be used to make an end-run around the § 2255(f) statute of limitations are important questions. These questions should be decided on full consideration, but the Government did not challenge the District Court's decision on these grounds in the Court of Appeals, see Brief for Petitioner 6, and the statute of limitations is not jurisdictional. See *Day v. McDonough*, 547 U. S. 198, 205 (2006).

Cases are not authority for questions which merely lurk in the record, of course. See *Webster v. Fall*, 266 U. S. 507, 511 (1925). Even so, it is better not to leave the issue to implication. These questions should be expressly reserved for future resolution.

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11. The subdivision designations were added to § 2255 in 2008. See Pub. L. 110-177, § 551, 121 Stat. 2545.

12. Petitioner concedes neither *Teague* exception applies. See Brief for Petitioner 5-6.

#### IV. No exception need or should be made for ineffective assistance claims.

In *Teague v. Lane*, 489 U. S. 288, 311 (1989), the plurality opinion recognized two exceptions to its general rule of nonretroactivity.<sup>13</sup> Petitioner now proposes that a third exception be made, exempting ineffective assistance of counsel claims, at least for federal cases. See Brief for Petitioner 34. The proposal to add a new exception to a sound and established body of jurisprudence should be rejected.

The argument that *Massaro v. United States*, 538 U. S. 500 (2003), somehow changed the law of ineffective assistance litigation so as to require this change reflects a misunderstanding of *Massaro*. That case did not make a rule forbidding ineffective assistance claims on direct review like the Arizona rule at issue in *Martinez v. Ryan*, 566 U. S. \_\_\_, 132 S. Ct. 1309, 1313, 182 L. Ed. 2d 272, 280 (2012). Quite the contrary. “We do *not* hold that ineffective-assistance claims *must* be reserved for collateral review.” *Massaro*, *supra*, at 508 (emphasis added). The Court recognized that practical realities will prevent raising ineffective assistance claims on direct review in most cases, see *id.*, at 508-509, but the holding of the case is purely for the benefit of defendants, carving out a safe harbor from the procedural default rule. See *id.*, at 509.

With regard to those practical realities, a more precise definition of the *Teague* rule is required. While it is sometimes loosely said that *Teague* limits the retroactivity of new rules on collateral review, the more precise rule is that *Teague* limits retroactivity in “cases

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13. The first exception has since been recharacterized as a limit on the scope of the rule rather than an exception to the rule. See *Schiro v. Summerlin*, 542 U. S. 348, 352, n. 4 (2004). The difference is not material to the present discussion.

already final on direct review.” *Whorton v. Bockting*, 549 U. S. 406, 409 (2007). Cases on collateral review are usually “already final on direct review” because the collateral petition is not usually filed until after the appeal is completed, but that is not universally true, and making an exception to that practice would be far less disruptive than poking a hole in the *Teague* doctrine.

Petitioner’s argument that ineffective assistance claims seeking to make new rules or relying on new rules could never be successful if *Teague* applied is based on an assumption that such review is always conducted after direct appeal. See Brief for Petitioner 37-38. It need not be. The Advisory Committee Note to Rule 5 of the Rules Governing § 2255 Proceedings for the United States District Courts, 28 U. S. C. foll. § 2255, p. 1268 (2006 ed.), quotes *Womack v. United States*, 395 F. 2d 630, 631 (CA DC 1968) for the proposition that the rule against a § 2255 petition in a case not yet final on appeal is not jurisdictional, but such petitions are reserved for “extraordinary circumstances.” Such circumstances were found for an ineffective assistance claim in *United States v. Prows*, 448 F. 3d 1223, 1228-1229 (CA10 2006), where the defendant wanted to attack his lawyer’s representation while the government pursued an unrelated appeal of the sentence.

A defendant seeking to make or take advantage of a “new rule” on an ineffective assistance claim is also an extraordinary circumstance. As noted *supra* at 18, the vast majority of ineffective assistance claims come within the “myriad of factual contexts” rubric and neither make nor rely on new rules. *Padilla* claims are an exceptional case. Since *Strickland* itself, no other ineffective assistance case in this Court has made a “new rule” for the purpose of *Teague* or 28 U. S. C.



§ 2244(b)(2), not even the dubious *Rompilla v. Beard*, 545 U. S. 374 (2005). See *In re Hutcherson*, 468 F. 3d 747, 749 (CA11 2006). The *Padilla* rule is different in kind, not just in degree, from other *Strickland* cases. *Padilla* expanded the scope of the representation subject to scrutiny into new territory.

The exceptional claim that seeks to expand ineffective assistance scrutiny into new territory can be made in a § 2255 motion brought before the case becomes final on direct appeal. Such a procedure will not raise the administrative problems that petitioner warns of, see Brief for Petitioner 37, because it will be exceptional and not “routine.” If appellate counsel is trial counsel, he might have to move for a different attorney to be appointed to make the claim, see Federal Defender Brief 15-16, but again that is not an excessive burden given the rarity of claims raising such an issue.

Expansion of the scope of ineffective assistance claims which may be used to attack a final conviction does not impact defense counsel alone. It also impacts what prosecutors and trial courts must do to defend their judgments. Judges go through colloquies with guilty-pleading defendants, and prosecutors stand ready to remind them to do so. No such requirement was in effect for immigration consequences before *Padilla*, and rules and practices must be changed to accommodate the new requirement. See Brief for the United States 41, n. 13. Should a judgment entered many years ago, agreed upon by the parties, be overturned because the judge’s colloquy did not include a subject that nearly universal precedent said did not need to be included?

Petitioner claims unfairness of the failure to apply *Padilla* retroactively, but the unfairness to the government and the people must also be considered. Did petitioner’s attorney, in fact, advise her of the immigration consequences of her plea or not? We do not know



and probably will never know. One of the principals involved is a convicted and admitted fraudster with a strong interest in the outcome. The other is dead. See Brief for the United States 5. The fraudster's word may be the preponderance of the evidence when the other side of the scale is empty, but it may well be empty because of the six-year delay between conviction and petition. See Pet. App. 33a-34a. The District Court's suggestion that it might be possible to track down the translator (and, implicitly, that the translator might remember a conversation translated years ago) is pure speculation.

Further, when a plea-bargained conviction is overturned on collateral review, the government must either retry a case on stale evidence or agree to a plea bargain even more favorable than the first one. In the present case, the petitioner completed her sentence before filing her petition, but that will not always be true.

As the Court considers the fairness argument in this case, it is also important to note the absence of any claim of innocence. Petitioner admits that she voluntarily engaged in fraud, and that the loss to the victim was \$26,000. See Brief for Petitioner 2-3. Congress has decided, as a matter of policy, that aliens who engage in frauds over \$10,000 should be removed, and it chose to gauge the size of frauds by damage to victim, not benefit to the fraudster. To be sure, there are some aspects of removal law that seem harsh, but those arguments must be addressed to Congress, not the courts. With no claim that she does not fall within the class of criminal aliens that Congress has decided should be removed, petitioner's fairness argument is a weak one, at best.

## CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit should be affirmed.

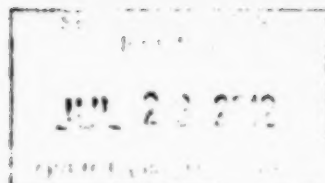
September, 2012

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae  
Criminal Justice Legal Foundation*

**AMICUS  
CURIAE  
BRIEF**



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In The  
**Supreme Court of the United States**

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ROSELVA CHAIDEZ,  
*Petitioner,*

*v.*

UNITED STATES,  
*Respondent.*

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*On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit*

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**BRIEF AMICI CURIAE OF HABEAS  
SCHOLARS AND CONSTITUTIONAL  
ACCOUNTABILITY CENTER  
IN SUPPORT OF PETITIONER**

---

DOUGLAS T. KENDALL  
ELIZABETH B. WYDRA\*

*\*Counsel of Record*  
CONSTITUTIONAL  
ACCOUNTABILITY  
CENTER

1200 18th St., NW, Ste 501  
Washington, D.C. 20036  
(202) 296-6889

[elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)

*Counsel for Amici Curiae*

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment, as applied to the States through the Fourteenth Amendment, when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation. Does this ruling apply retroactively to persons whose convictions became final before its announcement?

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The following scholars are experts in the field of *habeas corpus* law and appear as *amici curiae* to ensure the appropriate application of retroactivity principles to collateral review:

- Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at the Maurice A. Deane School of Law at Hofstra University. He is the author of *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (NYU PRESS 2002), and of numerous articles for scholarly and general publications concerning habeas corpus and related subjects.
- Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise entitled "Federal Habeas Corpus Law and Practice."

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<sup>1</sup> The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

- Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. He is the author and editor of *Habeas Corpus Checklists* (Thomson/Reuters 2012).

*Amicus curiae* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees.

CAC works to defend constitutional protections for non-citizen immigrants as well as for citizens. CAC filed an *amicus curiae* brief in support of the petitioner in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), and has an interest in seeing that *Padilla's* protection of the right to assistance of counsel required by the Sixth Amendment is applied retroactively.



## INTRODUCTION AND SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, this Court applied the analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel's misadvice regarding the immigration consequences of a guilty plea fell below the constitutionally required level of effective assistance of counsel in criminal proceedings. 130 S. Ct. 1473 (2010). Applying the first prong of the *Strickland* analysis—which asks whether counsel's representation “fell below an objective standard of reasonableness,” 466 U.S. at 688—the Court in *Padilla* held that a lawyer's failure to inform her client whether his plea carries a risk of deportation falls below the constitutional minimum. The question before the Court now is whether the retroactivity framework announced in *Teague v. Lane*, 489 U.S. 288 (1989), prevents Petitioner from pressing a *Padilla* claim of ineffective assistance of counsel on federal collateral review of a federal conviction.

The *Teague* framework should not apply in this case for two basic reasons.

First, the important federalism interests of comity and finality at the heart of *Teague* are not implicated when a federal court engages in post-conviction review of a federal, as opposed to state, conviction. While there remains, of course, a federal interest in the repose of final federal convictions, it is adequately protected by the *Strickland* test itself, which erects a high bar for

petitioners seeking to invalidate convictions because of constitutionally inadequate counsel.

Second, if *Teague* applied to ineffective assistance of counsel claims based on inadequate advice as to the immigration consequences of a guilty plea—which, in federal courts, may be brought only on collateral review—it would leave Petitioner and others in her situation with the right to counsel affirmed in *Padilla*, but no way to vindicate that right. Rather than getting the second bite at the apple that *Teague* sought to avoid when federal courts review state convictions, petitioners like Ms. Chaidez will get no “bite” at all. To apply *Teague* in this fashion would violate the deeply-rooted constitutional principle that for every violation of a right, there must be a remedy.

Even if the Court were to apply the *Teague* retroactivity framework to this case, it should not bar Ms. Chaidez’s claims here because *Padilla* did not announce a new rule. Rather, it reflected the Constitution’s guarantee that no criminal defendant—citizen or not—shall be deprived of the effective assistance of counsel.

The Sixth Amendment’s guarantee of the right to assistance of counsel is plainly not limited to citizens, but rather provides protection to the broader category of “the accused.” U.S. CONST. amend. VI. The Fourteenth Amendment, which applies the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further establishes the Constitution’s protections for non-citizens in our

nation's criminal justice system by requiring states to provide the protections of equality and fundamental fairness to aliens as well as to citizens. Under our Constitution, "no man, no matter what his color, no matter beneath what sky he may have been born, . . . shall be deprived of life, liberty, or property without due process of law." Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1094 (1866). Constitutional text and history mandate that the Sixth Amendment right to counsel in criminal proceedings shall not be diminished when a non-citizen defendant stands accused in our criminal justice system. *Padilla* simply recognized this constitutional command and applied *Strickland* when it held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." 130 S. Ct. at 1482.

This case raises a question of exceptional importance both to the proper, fair functioning of our justice system and to long-term legal residents like Petitioner who face deportation as a result of a prior conviction. This Court has acknowledged that deportation is akin to banishment, a particularly harsh penalty, and, as the Court recognized in *Padilla*, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. If citizens were automatically banished as a result of certain criminal convictions, surely it would not be a "new rule" if the Court were to apply the *Strickland* analysis of ineffective assistance and hold that the Constitution requires that they not be

misinformed as to this drastic consequence when deciding whether or not to plead guilty to a charged offense.

*Amici curiae* respectfully urge the Court to reverse the judgment below.

## ARGUMENT

### I. THE *TEAGUE* RETROACTIVITY FRAMEWORK SHOULD NOT APPLY IN THIS CASE.

This Court has expressly reserved the question whether the retroactivity framework articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and applied to federal collateral review of state convictions, applies to post-conviction filings in federal court challenging federal convictions. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008).

*Amici* agree with Petitioner that the *Teague* framework should not apply in this case. See Brief for Petitioner at 27-39. First, the important federalism interests furthered by *Teague*'s retroactivity regime are not implicated when a federal court engages in post-conviction review of a federal, as opposed to a state, conviction.

And second, applying *Teague* to ineffective assistance of counsel claims based on inadequate advice as to the immigration consequences of a guilty plea—which, in federal courts, may be brought only on collateral review—would leave

Petitioner and others in her situation with the right to counsel affirmed in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), but no way to vindicate that right.

**A. *Teague's* Federalism Concerns Are Not Implicated By Federal Collateral Review Of A Federal Conviction.**

The Court in *Teague* was motivated in large part by a reluctance to upset state convictions through the federal collateral review process, and intended to “minimize[e] federal intrusion into state criminal proceedings.” *Danforth*, 552 U.S. at 280. The Court explained that retroactively applying federal decisions articulating “new rules” of law to overturn state convictions, even when the state proceedings “conformed to then-existing constitutional standards,” would be highly “intrusive” and tread upon principles of comity. *Teague*, 489 U.S. at 310. See Brief for Petitioner at 28. Obviously, these considerations of intrusiveness and comity do not apply when a federal court is reviewing a federal conviction.

To be sure, the Court’s concerns about preserving the finality of convictions apply in the federal context, albeit without the federalism gloss present in *Teague*. But these concerns are not nearly as compelling in the context of federal collateral review of federal convictions. When a federal court entertains a state prisoner’s constitutional claims on habeas review, the state petitioner will have already have presented these claims to the state court (in order to meet



exhaustion requirements) and had them rejected. The state petitioner will thus have had at least one "bite at the apple" in state court. But in cases such as Petitioner Chaidez's, the federal petitioner will not have had a full and fair opportunity to raise the constitutional claim, as discussed further below. See Brief for Petitioner at 29-33.

Moreover, the federal finality interest is protected by the structure of the *Strickland* test itself. First, the courts' inquiry into whether counsel's performance was reasonably effective is highly deferential, recognizing that final judgments carry a "strong presumption of reliability." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Second, the prejudice prong of the *Strickland* test is expressly designed to protect "the fundamental interest in the finality of" convictions and "guilty pleas." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

Tellingly, the Court in *Padilla*, though expressly concerned with "protecting the finality of convictions obtained through guilty pleas," 130 S. Ct. at 1484, did not consider *Teague* even though Padilla's claim arose on collateral review. The Court simply applied the *Strickland* test to determine whether Padilla's claim met this already "high bar." *Id.* at 1485. Petitioner Chaidez should be given the same opportunity to have her claim assessed under *Strickland* and *Padilla*.



**B. Applying *Teague* In Cases Raising *Padilla* Claims Would Be Particularly Problematic Because It Would Impair The Ability Of Petitioners To Vindicate Their Right To Effective Assistance Of Counsel.**

*Padilla* recognized that “the Sixth Amendment right to effective assistance of counsel” requires “that counsel must inform her client whether his [or her] plea carries a risk of deportation” as the client considers whether to accept a plea deal. 130 S. Ct. at 1486. However, as Petitioner explains in her brief, application of *Teague* to her case and other *Padilla* claims could leave Ms. Chaidez and others with a right to effective counsel with respect to the immigration consequences of a guilty plea—but with no way to vindicate that right.

Specifically, because this Court has ruled that ineffective assistance of counsel challenges to federal convictions—at least those that depend on evidence outside the record, as virtually all *Padilla* claims would<sup>2</sup>—must be raised for the first time on collateral review, *Massaro v. United States*, 538 U.S. 500, 508 (2003), federal petitioners like Ms. Chaidez will not have been able to raise their *Padilla* right on direct review. Rather than getting the second bite at the apple that *Teague* sought to avoid, they will get no “bite” at all. To apply

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<sup>2</sup> In this case, the district court held an evidentiary hearing on Ms. Chaidez’s claims and found that both prongs of the *Strickland* test had been met and, accordingly, granted a writ of *coram nobis*, vacating her conviction. Pet. App. 36a.

*Teague* in this fashion would violate the American constitutional tradition, deeply rooted in Anglo-American law, that for every violation of a right, there must be a remedy.

The principle that for every right there must be a remedy traces to the Latin maxim, *ubi jus, ibi remedium*. One of the earliest foundations of this fundamental principle is the Magna Carta, which stated that “[t]o no one will we deny, or delay right or justice.” Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1310 n.4 (2003) (quoting Chapter 29 of the 1225 version of the Magna Carta). Over 400 years later, Sir Edward Coke further expanded on this idea stating:

[E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, . . . or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 55 (London, W. Clarke & Sons 1817) (1641).

Coke’s view of remedies was reflected in the 1703 case of *Ashby v. White*, which established that “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it . . . indeed it is a vain thing to imagine a right without

a remedy." 92 Eng. Rep. 126, 136 (K.B. 1703). Sir William Blackstone similarly described "the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that legal right is invaded." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*23 (1768). See also 1 BLACKSTONE, COMMENTARIES, at \*140-141 (noting that "in vain would these [absolute] rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment").

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice John Marshall established this maxim as an important principle of American constitutional law. As Chief Justice Marshall explained in *Marbury*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* Quoting Blackstone, Chief Justice Marshall observed that "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (quoting 3 BLACKSTONE, COMMENTARIES, at \*109). Chief Justice Marshall concluded: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

While scholars have observed that this principle is not “an ironclad rule” or “an unyielding imperative,” Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991), application of the principle to Ms. Chaidez is consistent with the moral and structural rationales that underlie it. As Professors Fallon and Meltzer explain, “[t]he strongest moral argument against denial of a remedy is that corrective justice demands redress on particular facts.” *Id.* at 1793. *Teague* is at its essence a doctrine about “redressability.” *Danforth*, 552 U.S. at 271 n.5. But the circumstances in which the Court has found *Teague* to bar redress of a constitutional violation do not exist here. Ms. Chaidez has not had the opportunity prior to collateral review to raise her *Padilla* claim of ineffective assistance of counsel. She is entitled to the opportunity to seek a remedy for the violation of her right to assistance of counsel, and *Teague* should not stand in the way.

## II. EVEN IF *TEAGUE* APPLIES, *PADILLA* DID NOT CREATE A NEW RULE.

Even if the Court applies the *Teague* retroactivity regime to this case, it should not bar Ms. Chaidez’s *Padilla* claim. Under the *Teague* framework, a decision that simply applied an established rule to the facts of a particular case will apply retroactively; a decision imposing a “new obligation on the States or the Federal Government” will not. *Id.* at 301. *Padilla* did not announce a “new rule.”

*Padilla's* recognition that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" and thus can serve as the basis for an ineffective assistance of counsel claim, 130 S. Ct. at 1482, does not impose a "new obligation on the States or Federal Government," *Teague*, 489 U.S. 301. See Brief for Petitioner at 13-27. It is well-established that the right to assistance of counsel when considering a guilty plea is the right to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added); *Strickland*, 466 U.S. at 686. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 116 (1998) (noting that "[t]he landmark English Treason Act of 1696, which first affirmed a right of counsel, explicitly spoke of '[c]ounsel learned in the law'" (citing 7 and 8 Will. 3, ch. 3, §I). This Sixth Amendment guarantee to effective counsel applies just as strongly to non-citizen defendants as it does to citizens: the right to counsel refers simply and broadly to "the accused." U.S. CONST. amend. VI.

The Fourteenth Amendment, which applied the Sixth Amendment to the States and was thus the constitutional backdrop of both *Strickland* and *Padilla*, further established the Constitution's protections for non-citizens by writing into our Constitution broad protections for liberty and equality, and guarantees of impartial justice. U.S. CONST. amend. XIV. Explaining the coverage of the equal protection and due process clauses of the Fourteenth Amendment—which apply not just to



“citizens,” but rather to “any person”—Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction that drafted the Amendment, affirmed that these “last two clauses . . . disable a State from depriving not merely a citizen of the United States but any person, whoever he may be, of life, liberty, or property without due process of law.” Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2766 (1866). See also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that “all persons within the territory of the United States,” including aliens, “are entitled to the protection” guaranteed by the Fifth and Sixth Amendments); *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963) (applying to the States the fundamental Sixth Amendment right to assistance of counsel). In sum, both the States and the federal government were constitutionally required to ensure that non-citizen criminal defendants receive the same guarantee of effective assistance of counsel long before *Padilla*. Simply put, the right to effective assistance of counsel was not newly announced in *Padilla*—the *Padilla* Court simply applied the guarantee of effective assistance of counsel to hold that counsel’s advice was constitutionally defective in the circumstances of that case.

Indeed, the Sixth Amendment does not identify “particular requirements of effective assistance,” *Strickland*, 466 U.S. at 688, and the contours of the guarantee of effective assistance of counsel have changed slightly for non-citizens in the criminal system. As explained in *Padilla*, in light of changes to our nation’s immigration laws,



“[t]he ‘drastic measure’ of deportation or removal [] is now virtually inevitable for a vast number of noncitizens convicted of crimes.” 130 S. Ct. at 1478 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). With these laws having “dramatically raised the stakes of a noncitizen’s criminal conviction[, t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important.” *Id.* at 1480.

*Strickland* imposes upon counsel the “dut[y] to consult with the defendant on important decisions.” 466 U.S. at 688. Entering into a guilty plea that could result in immigration consequences, including removal, is unquestionably an “important” decision. Deportation is a “particularly severe penalty.” *Padilla*, 130 S. Ct. at 1481; *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893). This Court has recognized that deportation can be the equivalent of “banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), which, throughout history, has been recognized as a harsh and drastic consequence. See *Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was “‘the highest punishment next to death’”) (quoting *Edward Earl of Clarendon’s Trial*, 6 How. St. Tr. 292, 386 (1667)). See also *Calder v. Bull*, 3 Dall. 386, 389 (1798) (citing the banishments of Lord Clarendon in 1667 and Bishop Francis Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963)

("[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment . . . . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice.") (citations and quotation marks omitted). Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Act that "[i]f the banishment of an alien . . . be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the names can be applied." James Madison, Report on the Virginia Resolutions of 1799, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (1836).

This Court has echoed Madison's sentiments, explaining that:

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

*Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

The severity of deportation and its importance to an alien's decision whether to plead guilty to a crime cannot be understated, as this Court has recognized. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001). As the Court recognized nearly ten years before the *Padilla* decision, “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender’s *Criminal Defense Techniques* §§60A.01, 60A.02[2] (1999)). See also *Bridges*, 326 U.S. at 164 (Murphy, J., concurring) (“The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.”).

For Ms. Chaidez, deportation would mean that she would be forced from the country she has called home for more than thirty years and separated from her U.S.-citizen children and grandchildren. Brief for Petitioner at 2. The importance of these consequences is undisputed. Here, the district court found after an evidentiary hearing that “had Chaidez known of the immigration consequences, she would not have pled guilty.” Pet. App. 36a.

Given the constitutional command that non-citizens enjoy the robust protections of the Sixth Amendment’s right to effective assistance of counsel just as citizens do, and the professional norms that require effective counsel to include advice regarding deportation consequences of a guilty plea to non-citizen defendants—both of which predate the *Padilla* ruling—the application of *Strickland*’s ineffective assistance of counsel

analysis to Mr. Padilla's case cannot have articulated a "new rule." *Padilla* imposes no "new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. The guarantee of effective assistance of counsel for citizens and non-citizens alike has bound the federal government since the ratification of the Sixth Amendment, and the states at least since the Amendment was incorporated by the Fourteenth Amendment.

\* \* \*

The integrity of the criminal justice system rests in no small part on the guarantee of effective assistance of counsel, because "it is through counsel that the accused secures his other rights." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). In this case, Petitioner is faced with the possibility that she might not have a remedy for the denial of her precious right to effective assistance of counsel on the undeniably important issue of the immigration consequences of a guilty plea. Since the Magna Carta, legal tradition has held that no person "shall be taken or imprisoned . . . or banished . . . except by . . . the law of the land." Phillips, at 1310 n.4 (quoting Chapter 29 of the 1225 version of the Magna Carta). Ms. Chaidez should not be deported based on her prior guilty plea without having the opportunity to vindicate her constitutional rights.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

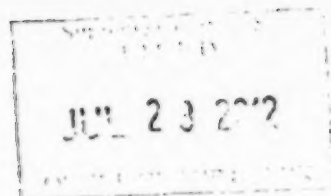
DOUGLAS T. KENTALL  
ELIZABETH B. WYDRA\*  
CONSTITUTIONAL  
ACCOUNTABILITY CENTER  
1200 18<sup>th</sup> Street NW  
Suite 501  
Washington, D.C. 20036  
(202) 296-6889  
elizabeth@theusconstitution.org  
*\*Counsel of Record*

*Counsel for Amici Curiae*

July 23, 2012

**AMICUS  
CURIAE  
BRIEF**





No. 11-820

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IN THE  
**Supreme Court of the United States**

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ROSELVA CHAIDEZ,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF OF AMICUS CURIAE NATIONAL  
ASSOCIATION OF FEDERAL DEFENDERS IN  
SUPPORT OF THE PETITIONER**

Sarah S. Gannett  
*Co-Chair, Amicus Committee*  
NATIONAL ASSOCIATION OF  
FEDERAL DEFENDERS  
601 Walnut St., Ste. 540W  
Philadelphia, PA 19106  
(215) 928-1100  
*Sarah\_Gannett@fd.org*

Stephen B. Kinnaird  
*COUNSEL OF RECORD*  
D. Scott Carlton  
Spencer G. Scharff  
PAUL HASTINGS LLP  
875 15th Street, N.W.  
Washington, DC 20005  
(202) 551-1700  
*stephenkinnaird@paulhastings.com*

*Counsel for Amicus Curiae  
National Association of Federal Defenders*

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## STATEMENT OF INTEREST<sup>1</sup>

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

In this case, NAFD is particularly interested because the holding adopted by the Seventh Circuit places undue and unnecessary ethical burdens on counsel in criminal cases, creates procedural traps for defendants claiming ineffective assistance of counsel, and compromises the efficient resolution of ineffective-assistance claims.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

In *Massaro v. United States*, 538 U.S. 500, 504 (2003), this Court relaxed the rules of procedural default to enable the efficient resolution of ineffective-assistance claims on collateral review. Subjecting such claims to the new-rule bar of *Teague v. Lane*, 489 U.S. 288 (1989), would invite many of the problems that this Court sought to cure in *Massaro*. Criminal defendants – with few exceptions – would be driven to raise ineffective-assistance-of-counsel claims prematurely on direct review.

Such premature claims would unnecessarily burden the judicial system because they typically require factual development outside of the trial court record. Application of *Teague* would not only cause a flood of premature claims that waste precious judicial resources, but would also inevitably result in a number of meritorious claims held by criminal defendants falling short.

Moreover, such a fundamentally unfair rule would place an undue burden on criminal defendants' counsel (including federal public defender offices) who would be forced to confront untenable conflicts of interest on direct review. If defendants pursue ineffective-assistance claims on collateral review, as contemplated by *Massaro*, judicial resources would be wasted and relief delayed as prosecutors attempt to convert any new factual twist in a case into a novel rule that would bar relief under *Teague*. NAFD submits that the extension of *Teague* to ineffective-assistance claims on federal collateral review, which is unsupported by the underlying intent of *Teague*, would unfairly deny relief to defendants who never

received a constitutionally adequate defense and would undermine judicial economy.

## INTRODUCTION

Although NAFD supports each of the arguments raised by Petitioner Roselva Chaidez regarding the inapplicability of *Teague* to ineffective-assistance-of-counsel claims, the membership of NAFD has particularly extensive experience representing criminal defendants in bringing ineffective-assistance-of-counsel claims in collateral proceedings. As such, NAFD's brief focuses on the administrability problems that would arise by applying *Teague* in this context. See Brief of Petitioner, Section II.B.

## ARGUMENT

### I. ***Massaro* Established an Efficient and Effective System for Adjudicating Federal Defendants' Ineffective-Assistance Claims.**

Prior to *Massaro*, criminal defendants in the Second and Seventh Circuits were effectively required to bring their ineffective-assistance-of-counsel claims on direct review because the two circuit courts adopted a procedural default rule. 538 U.S. at 503. The procedural default rule at issue allowed a criminal defendant, if represented by new counsel on appeal, to raise an ineffective-assistance claim only on direct review if the claim was based solely on the record made at trial. See, e.g., *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir. 1993), abrogated by *Massaro v. United States*, 538 U.S. 500 (2003). These claims were often rebuffed because the



defendants were forced to proceed on a record ill-suited to litigating or preserving a claim of ineffective assistance of counsel.<sup>2</sup>

To prove a violation of the Sixth Amendment right to counsel, a defendant must prove that he did not receive competent assistance of counsel and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Typically, the trial record does not disclose or otherwise provide the facts necessary and relevant to decide either prong of the *Strickland* analysis. The

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<sup>2</sup> In *United States v. Scott*, 243 F.3d 1103 (8th Cir. 2001), the defendant argued, in a pro se supplemental brief, that his trial “counsel provided ineffective assistance at sentencing by failing to object to the testimony” of a key government witness whose testimony was based, inter alia, on conversations, interviews, and dealings with a co-conspirator, who was not made available for cross-examination. *Id.* at 1109. The Court held that the Defendant’s ineffective-assistance claims must be raised in a § 2255 post-conviction proceeding because there was “not an adequate record to permit [consideration of] these ineffective assistance claims on direct appeal.” *Id.* In another direct appeal involving an ineffective-assistance claim, the defendant argued, inter alia, that his trial counsel provided ineffective-assistance by failing to challenge the police search warrant. *United States v. Osorio-Pena*, 247 F.3d 14, 20 (1st Cir. 2001). The Court refused to review ineffective assistance claim after noting the existence of “several factual disputes . . . that [went] to the merits of the ineffective assistance claim” and that required further factual development for a sufficient record. *Id.* (“For example, the government said that the confidential informant brought the police to [defendant’s] address, and provided the information about an incoming drug delivery that supports the probable cause basis for the warrant. [The defendant] said that the confidential informant’s tip had nothing to do with the defendant, and that there was no probable cause for the search because the police, in conducting surveillance of [the defendant’s] house, observed no suspicious activity.”).

trial record is devoted to issues of guilt or innocence of the criminal defendant, and not the competence of the defendant's counsel. *Massaro*, 538 U.S. at 505 ("The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them."). Further, trial courts, not appellate courts, are in the best position to assess the effectiveness of counsel and to evaluate the reasons for counsel's actions. See *United States v. Griffin*, 699 F.2d 1102, 1109 (11th Cir. 1983) ("In [a § 2255] proceeding, appellant has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created.").<sup>3</sup> Specifically, the district judge who presided at trial "having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial." *Massaro*, 538 U.S. at 506; see also *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993) ("[T]he trial judge, by reason of his familiarity with the case, is usually in the best position to assess both the quality of the legal

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<sup>3</sup> See, e.g., *United States v. McIntosh*, 280 F.3d 479, 481 (5th Cir. 2002) ("A claim of ineffective assistance of counsel generally cannot be reviewed on direct appeal unless it has been presented to the district court.") (internal citation omitted); *United States v. McNeely*, 20 F.3d 886, 889 (8th Cir. 1994) (ineffectiveness claims first "should be presented to the District Court pursuant to 28 U.S.C. § 2255 so that the parties may develop the facts, which ordinarily (as here) lie outside the original record . . .") (citations omitted).

representation afforded to the defendant in the district court and the impact of any shortfall in that representation. Under ideal circumstances, the court of appeals should have the benefit of this evaluation; otherwise, the court, in effect, may be playing blindman's buff.”).

Recognizing the shortcomings of the Second and Seventh Circuit's approach, in *Massaro*, the Court unequivocally held “that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.” 538 U.S. at 504.<sup>4</sup> Subsequently, ineffective assistance claims challenging federal convictions that depend on evidence beyond the trial record have been litigated almost exclusively on collateral review. See e.g., *United States v. Ferguson*, 669 F.3d 756, 763 (6th Cir. 2012) (“[I]n light of the limited record [the ineffective assistance of counsel claim] is more appropriately raised in the first instance in post-conviction proceedings.”) (relying on *United States v. Bradley*, 400 F.3d 459, 461-622 (6th Cir. 2005)); *United States v. Gulley*, 526 F.3d 809, 821-22 (5th Cir. 2008) (“[W]e decline to consider [the ineffective assistance claim] at this time, but do so without prejudice to Gulley's right to raise it in a habeas

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<sup>4</sup> Even prior to *Massaro*, the Court recognized that “[b]ecause collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation.” *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

corpus proceeding."). This system has worked well and has ensured that defendants are treated fairly.

## II. **Applying *Teague* to Ineffective-Assistance Claims Brought by Federal Defendants Effectively Undermines the *Massaro* Rule.**

### A. **The Policy Concerns of *Teague* Are Not Promoted by Its Application to Claims of Ineffective Assistance in Federal Proceedings.**

The Seventh Circuit's application of *Teague* in this case represents a fundamental departure from the Court's prior ineffective-assistance jurisprudence. *Teague* held that, with two exceptions, a prisoner seeking federal habeas relief may not rely on new constitutional rules of criminal procedure announced after the prisoner's conviction became final. 489 U.S. at 310 (plurality opinion). The Court stated that a case adopts a "new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301 (a "new rule" is one "not dictated by precedent existing at the time the defendant's conviction became final"). The Court, however, carefully fashioned *Teague*'s retroactivity principle in the specific context of federal collateral review of *state court criminal proceedings*.

Ultimately, *Teague* held that the balance tips in favor of ensuring the finality of convictions based on concerns of federalism, comity, and minimizing federal intrusion into state criminal proceedings. These concerns are entirely absent in the context of federal collateral review of *federal court criminal proceedings*. Rather than promote the policies of

*Teague*, applying *Teague* to ineffective-assistance claims brought in collateral review proceedings for federal convictions would only “creat[e] the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim,” thereby reintroducing the inefficient, unfair, and improper practices that the Court sought to resolve when it decided *Massaro*. 538 U.S. at 504.

Thus, the Court need only reaffirm the reading of *Teague* articulated in *Danforth v. Minnesota*, 552 U.S. 264 (2008), where the majority concluded that “the text and reasoning of Justice O’Connor’s opinion [in *Teague*] illustrate[s] that the rule was meant to apply *only* to federal courts considering habeas corpus petitions *challenging state-court criminal convictions*.” *Id.* at 279 (emphasis added). *But cf. id.* at 269 n.4 (noting that the case did not present, and the Court did not express an opinion on, the question “whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255”). Such a ruling would not only ensure a more efficient administration of federal defendants’ direct appeals and collateral attacks, but it would also ensure that federal defendants receive a full and fair opportunity to pursue their ineffective-assistance-of-counsel claims.

**B. Forcing Defendants to Raise Ineffective-Assistance Claims on Direct Review is Both Unfair to Defendants and Judicially Inefficient.**

Appellate counsel will, to avoid procedural or substantive bars, criticism, or even disciplinary



charges, raise ineffective-assistance claims on direct review that ought properly to be brought collaterally. The Court recognized these “perverse incentives for counsel on direct appeal” in *Massaro*: “To ensure that a potential ineffective-assistance claim is not waived—and to avoid incurring a claim of ineffective counsel at the appellate stage—counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit.” *Id.* at 506. Indeed, the Second Circuit, prior to *Massaro*’s abrogation of its default rule, explicitly encouraged appellate counsel to submit claims in the court of appeals, even if counsel believed they did not belong there. *See Billy-Eko*, 8 F.3d at 116 (“Even if new appellate counsel determines there is need for further extrinsic evidence, counsel would still be well-advised to err on the side of inclusion on direct appeal.”).

Driving defendants to present premature ineffective-assistance claims on direct review — which defendants would do not only if they are asking for a new rule, but if there is any *risk* that their claim could be characterized as a new rule — would be detrimental both to defendants’ rights and to judicial economy. Ineffective-assistance claims commonly depend on attorney acts or omissions not reflected in the trial record. “Since claims of ineffective assistance involve a binary analysis—the defendant must show, first, that counsel’s performance was constitutionally deficient and, second, that the deficient performance prejudiced the defense—such claims typically require the resolution of factual issues that cannot efficaciously be addressed in the first instance by an



appellate tribunal.” *Mala*, 7 F.3d at 1063 (citation omitted).<sup>5</sup>

“[E]vidence of alleged conflicts of interest,” for example, might be found “only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced.” *Massaro*, 538 U.S. at 505. Evidence of the adequacy of attorney investigation into evidence, witnesses, or juror misconduct is also usually not reflected in the record. See, e.g., *United States v. Costa*, 890 F.2d 480, 483 (1st Cir. 1989) (“In this case, for instance, any examination of the ineffective assistance claim necessarily would involve factual inquiries into whether the defendants did indeed notify their attorneys of the juror’s misconduct, what the attorneys said in response, and the reasons for this response. We are in no position to conduct such an inquiry.”); *United States v. Hoyos-Medina*, 878 F.2d 21, 22 (1st Cir. 1989) (“In this case, an evidentiary hearing would be necessary to determine whether, as defendant claims, defendant’s counsel threatened and

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<sup>5</sup> Further, as explained in the Government’s brief in *Massaro*, staying the appellate proceedings when confronted with an ineffective-assistance claim is not practical because “[a] routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA’s strict limitations on the filing of successive [post-conviction] motions.” Brief for Respondent at 30 n.14, *Massaro*, 538 U.S. 500 (2003) (01-1559), 2002 WL 31868910, at 30; see also *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (reading *Massaro* to support a choice to decline to remand for a hearing on an ineffectiveness claim); *United States v. Wilson*, 240 F. App’x 139, 145 (7th Cir. 2007) (“Since *Massaro*, we have not remanded any case [on direct review] for an evidentiary hearing on an attorney’s effectiveness.”).

misled defendant, or wrongfully refused to present witnesses on his behalf.”); *Carrion v. Smith*, 549 F.3d 583, 585 (2d Cir. 2008) (“We write today to emphasize that district courts should normally conduct their own evidentiary hearings—wherein they observe the relevant testimony firsthand—before reaching independent credibility determinations.”). Thus, “[e]ven meritorious claims would fail when brought on direct appeal if the trial record were inadequate to support them.” *Massaro*, 538 U.S. at 506.<sup>6</sup>

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<sup>6</sup> One need only look to the numerous circuit court decisions reversing the denial of an evidentiary hearing in a § 2255 ineffective-assistance case to see that development of the factual record is required in order for the petitioner to receive a fair opportunity to present his/her claim. See, e.g., *Owens v. United States*, 483 F.3d 48, 60-61 (1st Cir. 2007) (evidentiary hearing required for allegation of ineffective assistance of counsel); *Pham v. United States*, 317 F.3d 178, 185-86 (2d Cir. 2003) (“The variety of fact-finding approaches taken by courts—from expansion of the record . . . reflects the fact-sensitive flexibility of § 2255 as applied to prisoners’ habeas motions . . . it also suggests that once the court has determined that the nature of the prisoner’s allegations precludes summary adjudication, it should ensure that a full record is developed on disputed issues and that a live testimonial hearing be included as part of that process when warranted.”) (Sotomayor, J., concurring); *United States v. Booth*, 432 F.3d 542, 545-46, 50 (3d Cir. 2005) (evidentiary hearing required to determine whether defendant’s trial counsel was ineffective by not providing exhaustive list of plea options); *United States v. White*, 366 F.3d 291, 300-02 (4th Cir. 2004) (evidentiary hearing required because a factual dispute existed as to whether the Government actually made an oral promise to petitioner that his guilty plea was conditional); *United States v. Wynn*, 292 F.3d 226, 230-31 (5th Cir. 2002) (evidentiary hearing required based on allegation § 2255 motion should not be time-barred because attorney misrepresented status of case to petitioner); *Valentine v. United States*, 488 F.3d 325, 333-34 (6th Cir. 2007) (evidentiary hearing required when factual narrative of § 2255 motion alleges ineffective assistance

Not only do ineffective-assistance claims usually depend on extra-record evidence, but the investigation of such claims often consumes months or years, or involves evidence that comes to light well after conviction. See, e.g., *Winston v. Kelly*, 592 F.3d 535, 542-43 (4th Cir. 2010) (noting that a crucial psychological evaluation and I.Q. test score was found only two weeks before the evidentiary hearing where “the district court heard from nine witnesses over two days and received documentary evidence not presented to the state courts”); *Perez v. United States*, 286 F. App’x 328, 330 (7th Cir. 2008) (“Over the course of several months the district court held three evidentiary hearings on [Petitioner’s] claim of ineffective assistance of counsel”); cf. *Ward v. Hall*, 592 F.3d 1144, 1158–61 (11th Cir. 2010) (rejecting argument that budget problems were responsible for petitioner’s inability to develop claims in state court where he was “afforded approximately three years to secure affidavits and witness testimony prior to his state habeas evidentiary hearings and managed to submit numerous exhibits and affidavits during the course of his hearings, including affidavit testimony from family members, friends, acquaintances, and former jurors . . .”). Even if new appellate counsel is appointed, it is virtually impossible to commence, much less complete, the needed investigation in the

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of counsel, and is not contradicted by the record nor “inherently incredible”); *Bruce v. United States*, 256 F.3d 592, 597-98 (7th Cir. 2001) (evidentiary hearing required because record insufficient to evaluate petitioner’s ineffective-assistance claim and, if proved, facts alleged would warrant relief); *Sinisterra v. United States*, 600 F.3d 900, 912 (8th Cir. 2010) (evidentiary hearing required for ineffective-assistance claim regarding failure to investigate and present mitigating evidence).

very limited time between judgment and appeal. See Fed. R. App. P. 4(b)(1)(A) (“In a criminal case, a defendant’s notice of appeal must be filed in the district court within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government’s notice of appeal.”). Nor, in the common occurrence of a guilty plea, is there even a sound method for raising such claims in the trial court; a defendant may supplement the trial court record only through a motion to withdraw the guilty plea. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 n.56 (2007). The window for bringing such a motion in federal court is quite narrow because it must be made before sentencing. See Fed. R. Crim. P. 11(d)(2) (providing that “after the Court accepts the plea, but before it imposes sentence[,] . . .” the defendant may withdraw his plea if the court rejects the agreement or the defendant can show a fair and just reason for requesting the withdrawal).<sup>7</sup>

For all these reasons, in the post-*Massaro* world, when defendants have attempted to raise ineffective-assistance claims on direct review, the appellate courts have, in most instances, declined to consider them, instead dismissing such claims “without prejudice to [their] ability to present those claims properly in the future . . . .” *Wilson*, 240 F. App’x at

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<sup>7</sup> Even in cases that go to trial, “[a]bbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) (citing Primus, *supra* at 689, and n.57).

145. If *Teague* were applied to such claims, the federal appellate courts would likely be forced to abandon this practice, and reach the ineffective-assistance claims on direct review. This might prevent the defendant from raising the same claim later, when factual development would permit an accurate resolution. See, e.g., *Fuller v. United States*, 398 F.3d 644 (7th Cir. 2005) (barring the defendant from relitigating his ineffective-assistance claim that he contended was “only presented . . . on direct appeal so that he would avoid the risk of procedurally defaulting it . . . .”); see also *Mui v. United States*, 614 F.3d 50, 55 (2d Cir. 2010) (“Even after *Massaro* . . . a Section 2255 petitioner may not relitigate questions which were raised and considered on direct appeal, including questions as to the adequacy of counsel.”) (citations omitted) (internal quotation marks omitted).

Thus, if this Court were to follow the lead of the Seventh Circuit, defendants would be forced to choose between the risk of an undeveloped (or underdeveloped) claim and the uncertain risks of whether a district court (or appellate court) may deem his claim to seek a new rule. A rule that encourages counsel to raise claims the appellate court cannot decide (at some risk to his client) is at best a pointless waste of a party’s and court’s time and resources, and at worst an unfair trap for criminal defendants attempting to preserve constitutionally granted rights. The true test of a rule of procedure is whether it “induce[s] litigants to present their contentions to the right tribunal at the right time.” *Massaro*, 538 U.S. at 504 (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993)). Applying



*Teague* in this context would actually undermine the purpose of a procedural rule.

**C. Forcing Defendants to Raise Ineffective-Assistance-of-Counsel Claims on Direct Review Alters the Usual Function of Appellate Counsel and Damages the Necessary Cooperation Between New Appellate Counsel and Trial Counsel.**

Encouraging ineffective-assistance claims to be brought on direct review will have multiple adverse effects on the conduct of counsel with regard to appeals.

First, it is common (and sometimes advisable or at least cost-efficient) for trial counsel to continue as lead appellate counsel. Given that trial counsel is most familiar with the record and the legal issues, and that obtaining new appellate counsel has many tangible costs, it is unsurprising that “continuity of counsel” is an attractive option for many clients. Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1130 (1999).

Continuity presents special challenges, however, if ineffectiveness claims must be raised on direct review. This Court has noted, as have others, that a lawyer is exceedingly unlikely to challenge his or her own effectiveness. See, e.g., *Massaro*, 538 U.S. at 502-03; *United States v. Munoz*, 605 F.3d 359, 369 (6th Cir. 2010). This is likely true even for those



lawyers who in good faith examine the trial record for evidence of their own mistakes. *Munoz*, 605 F.3d at 369. Accordingly, courts have excused the failure of petitioners to raise ineffective assistance claims on direct review where trial counsel also served as appellate counsel. See, e.g., *Contreras v. United States*, Nos. 02 CR 1451, 05 CIV. 9022, 2006 WL 2819644, at \*2-3 (S.D.N.Y. Sept. 29, 2006). Asking and expecting counsel to raise, on appeal, claims of their own ineffectiveness at trial is both unreasonable and unrealistic.<sup>8</sup> Yet, applying *Teague* to ineffective-assistance claims brought in collateral review might preordain this outcome.

Second, even in circumstances where new appellate counsel is added, the proposed *Teague* rule is untenable. The heavy burden of investigating ineffective-assistance allegations for direct review adds substantially more to the already full plate of the appellate lawyer. As this Court has recognized,

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<sup>8</sup> See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 620 n.5 (2005) (“A lawyer may not, however, perceive his own errors . . . .”); *White v. Kelso*, 401 S.E.2d 733, 734 (Ga. 1991) (“[A]n attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness . . . .”); *People v. Moore*, 797 N.E.2d 631, 638 (Ill. 2003) (“It would be inappropriate for trial counsel to argue a motion that is predicated on allegations of counsel’s own incompetence.”); *Commonwealth v. Saranchak*, 866 A.2d 292, 299 n.9 (Pa. 2005) (“[T]rial counsel cannot be expected to raise his own ineffectiveness on direct appeal . . . .”); *Robinson v. State*, 16 S.W.3d 808, 812 (Tex. Crim. App. 2000) (“[I]t is unrealistic to expect that the attorney charged with ineffectiveness will subsequently realize all of his mistakes and be able to adequately prosecute the claim.”); *Calene v. State*, 846 P.2d 679, 684 (Wyo. 1993) (“It is recognized that trial counsel should [not] be . . . expected to contend ineffectiveness of performance by himself . . . .”).

filing any appeal demands that counsel become “familiar with a lengthy record on a short deadline . . .” *Massaro*, 538 U.S. at 506. Moreover, appellate counsel is generally not required—and in some cases not even permitted—to raise on appeal those issues not preserved in the trial record. See Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 606 (2011) (“In most jurisdictions . . . appellate counsel may only raise errors that appear on the face of the trial court record.”). Appellate lawyers are likely either to overlook or forgo ineffective-assistance claims on direct review.

Third, cooperation between appellate counsel and trial counsel—necessary for preparing any appeal—would be impeded if appellate counsel were forced to argue, on direct review, trial counsel’s incompetence. During the preparation of an appeal, trial counsel’s help is essential, given that there are aspects of the case not readily apparent in the transcript. However, once trial counsel learns of the potential for an ineffectiveness claim, he or she is apt to be far less cooperative.

This Court has given credence to such policy concerns. For example, in examining a rule that would require ineffective-assistance claims to be brought on direct review, this Court wisely noted that appellate counsel would be put “into an awkward position vis-a-vis trial counsel.” *Massaro*, 538 U.S. at 506. The likely effect of such a rule is that “trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel’s own incompetence.” *Id.*

Other courts have similarly recognized this problem. For example, where trial counsel helped prepare a section of the appellate brief, appellate counsel of record “was in an awkward position” and, thus, his failure to raise an ineffectiveness claim on direct review did not procedurally bar a later collateral challenge. *Carter v. Gibson*, 27 F. App’x 934, 943 (10th Cir. 2001).

Finally, these dynamics will pose particular problems for Federal Public Defenders. Depending on the interests of the client and available resources, a Federal Public Defender Office will sometimes have its trial counsel take the lead on appeals, or sometimes place a new appellate lawyer in the lead, drawing heavily on the assistance of trial counsel. Retaining the appeal within the Office is generally of immense benefit to the client. But if the constitutional adequacy of the assistance provided by one of the Office’s lawyers is called into question, and as a practical matter must be raised on direct review, most Offices as a matter of policy are likely to withdraw from the appeal and turn the case over to counsel appointed under the Criminal Justice Act. Given the unfamiliarity of counsel with the record and the law, this may in many circumstances compromise the client’s prospects on appeal, including claims that have nothing to do with the Sixth Amendment.

Ultimately, applying *Teague* to the collateral review of federal court criminal proceedings will encourage ineffective-assistance claims to be brought on direct review and, in turn, will upset the usual role of appellate counsel.

### III. The Application of *Teague* to Ineffective-Assistance Claims Further Complicates Sixth Amendment Jurisprudence.

As the Court has previously noted, application of *Strickland* calls for “fact-specific analysis . . . .” *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010) (“[W]e have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.”). These fact-intensive inquiries necessarily result in significant variation between different ineffective-assistance claims. Such variation does not easily lend itself to *Teague*’s old-new rule distinctions because it inevitably requires the reviewing court to compare the established precedent to the nuanced facts of the case under review. Thus, applying *Teague* to ineffective-assistance claims simply adds a layer of unnecessary complexity to an already difficult and time-consuming case.

If the Court upheld the Court of Appeals opinion, *Teague* litigation would become part of any ineffective-assistance-of-counsel claim, to the extent that parties continued on *Massaro*’s preferred course of bringing such claims on collateral review. Government prosecutors would attempt to convert any new factual twist in a case, such as here where the advice concerned a collateral consequence, into a novel rule. Judicial resources would be wasted, and a complex and unnecessary jurisprudence would develop. See Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(D)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 703 (2003) (“[I]t is worth noting that the ‘law’ of *Strickland* is

underdeterminate in the sense that it provides guidelines for determining the circumstances under which ineffective assistance of counsel may be established, but it does not provide bright-line solutions for each fact-specific case.”). Moreover, such complexity and unpredictability increases the likelihood that district and circuit splits will develop.

*Teague* is simply an unworkable rule in the context of *Strickland* claims. This Court should not go down that path.

## CONCLUSION

For all the foregoing reasons, in addition to those advanced by the Petitioner, this Court should reverse the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Stephen B. Kinnaird (*Counsel of Record*)  
D. Scott Carlton  
Spencer G. Scharff  
PAUL HASTINGS LLP  
875 15th Street, N.W.  
Washington, DC 20005  
(202) 551-1700  
*stephenkinnaird@paulhastings.com*

Sarah S. Gannett  
*Co-Chair, Amicus Committee*  
NATIONAL ASSOCIATION OF FEDERAL  
DEFENDERS  
601 Walnut St., Ste. 540W  
Philadelphia, PA 19106  
(215) 928-1100  
*Sarah\_Gannett@fd.org*  
  
Counsel for *Amicus Curiae*  
National Association of Federal  
Defenders

July 23, 2012



**AMICUS  
CURIAE  
BRIEF**

**In The  
Supreme Court of the United States**

ROSELVA CHAIDEZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit

**BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID  
& DEFENDER ASSOCIATION, LAW OFFICE OF THE  
COOK COUNTY PUBLIC DEFENDER, PUBLIC  
DEFENDER'S OFFICE FOR THE ELEVENTH JUDICIAL  
CIRCUIT OF FLORIDA, LOS ANGELES COUNTY  
PUBLIC DEFENDER'S OFFICE, KENTUCKY  
DEPARTMENT OF PUBLIC ADVOCACY, IMMIGRATION  
IMPACT UNIT OF THE MASSACHUSETTS COMMITTEE  
FOR PUBLIC COUNSEL SERVICES, NEW YORK STATE  
DEFENDERS ASSOCIATION, LEGAL AID SOCIETY,  
OREGON CRIMINAL DEFENSE LAWYERS  
ASSOCIATION, NEW MEXICO CRIMINAL DEFENSE  
LAWYERS ASSOCIATION, ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS OF NEW JERSEY, HALL COUNTY  
PUBLIC DEFENDER, LANCASTER COUNTY PUBLIC  
DEFENDER'S OFFICE, TEXAS FAIR DEFENSE  
PROJECT, WASHINGTON DEFENDER ASSOCIATION,  
OFFICE OF THE DEFENDER GENERAL OF VERMONT,  
NEIGHBORHOOD DEFENDER SERVICE OF HARLEM,  
FLORENCE IMMIGRANT AND REFUGEE RIGHTS  
PROJECT, IMMIGRANT DEFENSE PROJECT,  
IMMIGRANT LEGAL RESOURCE CENTER, AND  
NATIONAL IMMIGRATION PROJECT OF THE  
NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER**

JEFFREY S. TRACHTMAN  
CRAIG LOUIS SIEGEL\*  
JENNIFER E. BATTERTON  
RACHEL L. FEINBERG  
SARAH N. ROSEN

KRAMER LEVIN NAFTALIS &  
FRANKEL LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100  
csiegel@kramerlevin.com

*\*Counsel of Record*

*Counsel for Amici Curiae*

[Additional Counsel Listed On Inside Cover]

JOSHUA L. DRATEL  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
1501 K Street, N.W.  
Washington, D.C. 20005

EDWIN A. BURNETTE  
NATIONAL LEGAL AID &  
DEFENDER ASSOCIATION  
1140 Connecticut Avenue, N.W.  
Washington, D.C. 20036

SEJAL R. ZOTA  
NATIONAL IMMIGRATION  
PROJECT OF THE  
NATIONAL LAWYERS GUILD  
14 Beacon Street, Suite 602  
Boston, Massachusetts 02108

DAWN M. SEIBERT  
IMMIGRANT DEFENSE PROJECT  
28 West 39th Street, Suite 501  
New York, New York 10018

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* include associations of public and private criminal defense lawyers who have represented or counseled thousands of immigrants accused of crimes over the years. *Amici* also include immigrant advocacy and service organizations that have expertise concerning the immigration consequences of criminal convictions and have provided resources and training to the criminal defense bar for years. On a daily basis, *amici* and their practitioner members confront the uniquely difficult circumstances faced by criminal defendants who are non-citizens. They are well aware of how detention and deportation, especially resulting from a wrongfully procured plea-based conviction, imposes an intolerably harsh and unfair penalty on many non-citizens and their families – including petitioner and her family. *Amici* have worked through the years to develop proper standards of conduct for defense counsel in this area and

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<sup>1</sup> Pursuant to Rule 37.3 of the Rules of the Supreme Court (Rules), all parties have consented to the filing of this *amici curiae* brief. Respondent's consent letter is being filed herewith. Petitioner's consent letter was filed with the Court on June 15, 2012. Pursuant to Rule 37.6, no counsel for a party authored the brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. In addition, no persons or entities other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

are well aware of the real-world implications of these standards for counsel who must abide by them on the front lines every day.

Many of the *amici* joining this brief were signatories to the *amici curiae* briefs filed by the National Association of Criminal Defense Lawyers (NACDL), the National Legal Aid & Defender Association (NLADA), and others in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), and *INS v. St. Cyr*, 533 U.S. 289 (2001). In *Padilla*, the Court relied on professional standards and resources discussed in the NACDL/NLADA brief in concluding that “[f]or at least the past 15 years,” *Padilla*, 130 S. Ct. at 1485, the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at 1482. In this case, the Court will resolve whether there is a remedy for *Padilla* violations pertaining to convictions that were final prior to March 31, 2010, the date *Padilla* was announced. *Amici* are greatly interested in the Court’s resolution of this issue.<sup>2</sup>

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## SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court applied the well-settled principles of

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<sup>2</sup> Separate statements of interest for each of the *amici* are included in Appendix A.

*Strickland v. Washington*, 466 U.S. 668 (1984), to confirm that a non-citizen defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when her lawyer fails to inform her about the immigration consequences of a criminal plea. Under *Strickland*, a lawyer provides ineffective assistance when she unreasonably fails to advise her client according to prevailing professional norms. 466 U.S. at 688. A court assessing the reasonableness of a lawyer's performance must review professional norms in existence at the time of that performance. *Id.* at 690. *Padilla* held that counsel's failure to advise Jose Padilla about the risk of deportation when he pled guilty in 2002 was ineffective assistance because "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." 130 S. Ct. at 1485.

The longstanding existence of these deeply rooted professional norms compels the conclusion that, under *Strickland*, it was plainly unreasonable in 2003 (when Roselva Chaidez pled guilty), and for many years before then, for counsel to fail to advise a non-citizen client about the immigration consequences of a criminal conviction. As this brief explains in Point I *infra*, national criminal justice standards promulgated by the American Bar Association and *amicus* National Legal Aid & Defender Association, as well as

many local professional standards and criminal defense treatises and other authoritative publications, have long informed criminal defense lawyers of their ethical duty to advise non-citizen clients about the immigration consequences of criminal convictions. In addition, as explained in Point II *infra*, an extensive array of national and local resources widely available to criminal defense lawyers for decades – including treatises, articles, practice guides, and trainings – has educated the defense bar about these consequences and amply supported defense counsel's fulfillment of their ethical duty to advise their non-citizen clients about them.<sup>3</sup> Finally, in Point III *infra*, this brief explains that the standards and resources discussed herein arose and developed over many years in response to immigration laws that have long imposed the harsh and often mandatory penalties of deportation and exclusion on non-citizens convicted of an increasingly long list of federal and state crimes.

Accordingly, for the reasons stated herein and in petitioner's brief, and in the interest of fairness, the Court should hold that *Padilla* applies retroactively to allow petitioner and other similarly situated persons to access a remedy for *Padilla* violations suffered

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<sup>3</sup> A partial and representative list of these resources is contained in Appendix B.

when the professional norms discussed herein were in place.<sup>4</sup>

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## ARGUMENT

### I. *Padilla* Did Not Announce A New Constitutional Rule of Law And Therefore Applies To Convictions That Were Final Before Its Announcement.

The longstanding existence of deeply rooted professional norms requiring defense counsel to provide advice on the immigration consequences of a criminal plea demonstrates that for many years, under *Strickland*, counsel's failure to give such advice was constitutionally ineffective, including when petitioner pled guilty in 2003. Petitioner's brief ably demonstrates that because *Padilla* did nothing more than straightforwardly apply *Strickland*'s ineffectiveness standard

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<sup>4</sup> A holding by this Court that there is a remedy for *Padilla* violations pertaining to convictions that were final before *Padilla* was decided will permit lower courts deciding particular ineffectiveness claims to determine whether a particular counsel's challenged conduct was unreasonable under prevailing professional norms and violative of *Padilla*. See *Strickland*, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."). See also *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (rejecting "'per se rule[s] as inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.' 466 U.S., at 688.").



to assess counsel's performance under prevailing professional norms, *Padilla* did not announce a "new rule" of constitutional law under the retroactivity framework of *Teague v. Lane*, 489 U.S. 288 (1989), and thus it applies to persons, like petitioner, whose convictions were final before its announcement. Brief for Petitioner at 9-10, 13-27.<sup>5</sup>

**A. Professional Standards Have Long Recognized A Criminal Defense Lawyer's Duty To Advise A Non-citizen Client About The Immigration Consequences of A Criminal Conviction.**

The Court reiterated in *Padilla* that, under the first prong of the *Strickland* standard for ineffective assistance of counsel claims, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms. . . . as reflected in American Bar Association standards and the like." *Padilla*, 130 S. Ct. at 1482 (internal citations omitted) (quoting *Strickland*, 466 U.S. at 688). Citing American Bar Association (ABA) and NLADA standards, local standards, treatises, articles, and practice materials from 1993 through 2009, the Court concluded that "[f]or at least the past 15 years, professional norms have generally imposed an obligation

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<sup>5</sup> Even if *Padilla* did announce a new rule, it should still apply to collateral challenges of federal convictions that were final when *Padilla* was decided, for the reasons petitioner asserts. Brief for Petitioner at 10-12, 27-39.

on counsel to provide advice on the deportation consequences of a client's plea." *Id.* at 1485.

These and other relevant standards and materials demonstrate that prevailing professional norms have long required criminal defense lawyers to advise a non-citizen client about the immigration consequences of a plea. Over the years, these standards and materials have "adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Id.* at 1482. However, they have always reflected counsel's core ethical duty to investigate, and consult with a client on, all matters important to a client in deciding whether to enter a plea, including the risk of deportation. These standards and materials include the following:

**ABA Criminal Justice Standards.** In *Padilla*, the Court cited the 1999 third edition of an ABA criminal justice standard in support of its conclusion about professional norms. This standard requires that "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), at 116 (3d ed. 1999) (cited in *Padilla*, 130 S. Ct. at 1482). The commentary to Standard 14-3.2(f) states that these consequences may include "immigration consequences" and adds that counsel "should be familiar with the basic immigration consequences that flow from different types of guilty pleas," because "it may well be

that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*, cmt. at 126-27.

In *St. Cyr*, the Court cited the commentary to the 1982 second edition of this particular ABA standard to conclude that "the American Bar Association's Standards for Criminal Justice provide that, *if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'*" 533 U.S. at 323 n.48 (emphasis added) (citing ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2, cmt. at 75 (2d ed. 1982)).<sup>6</sup> The commentary cited in *St. Cyr* states: "The standard also recognizes the need for counsel to advise the defendant on other considerations 'deemed important by . . . the defendant.' Many collateral consequences may follow conviction . . . even deportation or expatriation." ABA Standards for Criminal Justice, Pleas of Guilty Standard 14-3.2, cmt. at 75 (2d ed. 1982). In addition, the text of the standard states: "To aid the defendant in reaching a decision, defense

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<sup>6</sup> The commentary to the 1999 third edition of Standard 14-3.2 makes clear that subsection (f) does not impose any new requirements but reiterates an understanding of the standard dating back at least to the 1982 second edition cited in *St. Cyr*. ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. at 125-26 (3d ed. 1999) ("[While] Standard 14-3.2(f) is another new provision. . . . the standards always required defense counsel to advise his or her client concerning other considerations 'deemed important by defense counsel or the defendant' (Standard 14-3.2(b)).").

counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.” *Id.*, 14-3.2(b), at 73. The quoted text of and commentary to the 1982 second edition are virtually identical to the text of and commentary to the 1968 first edition of this standard.<sup>7</sup>

These national standards show that the ABA has long recognized defense counsel’s duty to fully advise non-citizen clients about the possible deportation consequences of a plea.<sup>8</sup> These standards are “valuable

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<sup>7</sup> *Id.*, 3.2(b), at 70 (1st ed. 1968) (“To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.”); *id.*, 3.2, cmt. at 71 (“The standard also recognizes the need for counsel to advise the defendant on other considerations ‘deemed important by him or the defendant.’ Many collateral consequences may follow conviction . . . even deportation or expatriation.”).

<sup>8</sup> In addition, the 1993 third edition of another ABA standard, relied on by *Padilla* for its conclusion about professional norms, requires counsel to provide advice “concerning all aspects of the case.” ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-5.1(a), at 197 (3d ed. 1993) (cited in *Padilla*, 130 S. Ct. at 1482). The 1971 first edition of this standard contains essentially identical language. Compare *id.* (“After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.”), with *id.*, Standard 5.1(a), at 127 (1st ed. 1971) (“After informing himself fully on the facts and the law, the lawyer should advise the

(Continued on following page)

measures of the prevailing professional norms of effective representation,” *Padilla*, 130 S. Ct. at 1482, not only because the Court has repeatedly relied on them, but because of their prominence within the criminal justice bar; they reflect the considerable expertise of distinguished lawyers and jurists from across the nation.<sup>9</sup> Chief Justice Warren E. Burger, who served as chairman of the ABA Project that drafted the initial Standards for Criminal Justice, explained:

The Standards represent more than 10 years of intense work, study, and debate by more than 100 of the nation’s leading jurists, lawyers, and legal scholars. . . . The participants were drawn from every part of the country and included state and federal judges, prosecuting attorneys, defense lawyers, public defenders, law professors, penology experts and police officials. In addition, the active participants consulted with scores of other interested and knowledgeable individuals in the criminal justice field for their advice and assistance. . . . *In sum, this project was much more than a theoretical and idealistic re-statement of the law, but rather a synthesis of*

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accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.”).

<sup>9</sup> In addition to *Padilla* and *St. Cyr*, the Court has cited ABA criminal justice standards in evaluating attorney performance in *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); and *Flores-Ortega*, 528 U.S. at 479.



*the experience of a diverse and highly experienced group of professionals.*

Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 252-53 (1974) (emphasis added). As of 1974, these ABA standards had “already been adopted by several states and [were] under active consideration in many others.” *Id.* at 253.

**NLADA Criminal Defense Standards.** In addition to the ABA standards, the defense community has long endorsed standards requiring counsel to inquire about a client’s immigration status and to advise about the immigration consequences of a plea. Foremost among these are *amicus* NLADA’s *Performance Guidelines for Criminal Defense Representation* (NLADA Guidelines), on which the Court relied in *Padilla*. 130 S. Ct. at 1482 (citing NLADA Guidelines §§ 6.2-6.4 (1997); *id.*, § 6.2 (1995)). At the time the NLADA Guidelines were first adopted in 1994, NLADA had nearly fifty years of experience supporting the provision of quality defense representation, including extensive experience “training attorneys (especially those who directly represent poor defendants), filing *amicus* briefs in cases impacting on the provision of counsel, pooling information from defender offices and assigned counsel programs and disseminating it, educating public officials and the public at large about criminal justice issues impacting the poor, and promulgating standards relating to the provision of counsel.” NLADA Guidelines at 6 (1995). As a result, the NLADA Guidelines “reflect



the knowledge and experience NLADA has gained in these endeavors, and represent the collective effort of experienced attorneys” and others. *Id.*

Many of the NLADA Guidelines underscore that competent defense counsel must take into account the risk of deportation at all stages of the criminal process, including at the initial interview, plea bargaining, and sentencing stages. For example:

- At the initial interview stage, NLADA Guideline § 2.2(b)(2)(A) makes clear that counsel should determine the client’s “immigration status.”
- At the plea bargaining stage, NLADA Guideline § 6.2(a) specifies that as part of an “overall negotiation plan” prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including “deportation;” *id.* § 6.3(a) requires that counsel explain to the client “the full content” of any “agreement,” including “the advantages and disadvantages and the potential consequences;” and *id.* § 6.4(a) requires that prior to entry of the plea, counsel make certain the client “fully and completely” understands “the maximum punishment, sanctions, and other consequences” of the plea.
- At the sentencing stage, NLADA Guideline § 8.2(b) requires that counsel be

“familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation;” and *id.* § 8.3(a) requires that counsel inform the client of “the likely and possible consequences of sentencing alternatives.”

**State and Local Standards.** The Court in *Padilla* cited state and local standards from 1996 through 1999 that, similar to the NLADA Guidelines, require defense counsel to learn about a client’s immigration status during an initial interview and to negotiate a plea agreement in light of the immigration consequences for the client. *Padilla*, 130 S. Ct. at 1482 (citing Dept. of Justice, Office of Justice Programs, 2 *Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance* at D10, H8-H9, J8 (2000)). There are many other such state and local standards. For example, the committee appointed by the Massachusetts Supreme Judicial Court to oversee the provision of legal representation to indigent persons in criminal court cases has long issued standards requiring public defenders and bar advocates to advise a defendant of the immigration consequences of her conviction. Massachusetts Committee for Public Counsel Services, *Performance Standards Governing Representation of Indigents in Criminal Cases*, § 5.10(e) (Nov. 1988).

In North Carolina, defense counsel are ethically required to ask a client during the initial interview about her “immigration status” and to discuss with a client “potential collateral consequences of entering a

plea, such as deportation or other effects on immigration status.” North Carolina Commission On Indigent Defense Services, *Performance Guidelines for Indigent Defense Representation In Non-capital Criminal Cases At The Trial Level*, Guidelines 2.2(c)(2)(A), 6.2(b)(8) (2004); See also Virginia Indigent Defense Commission, *Standards for Practice for Indigent Defense Counsel*, Standards 2.2(b)(3)(A), 6.2(a)(3) (2006) (requiring counsel to inquire about “immigration status” and “ensure the client is aware of . . . the possibility of deportation”). The New York State Bar Association requires public defenders to work to “avoid[, if at all possible, collateral consequences including . . . deportation.” New York State Bar Association, *Standards for Providing Mandated Representation*, Standard I-7(a)(v) (2005). Furthermore, public defender offices in San Francisco and New York City, which represent large numbers of non-citizen defendants, have instructed their attorneys for decades to consider the immigration consequences of a client’s conviction. *People v. Soriano*, 240 Cal. Rptr. 328, 335 (Cal. Ct. App. 1987) (San Francisco Public Defender’s office “imposes on its staff attorneys, under its Minimum Standards of Representation, the duty to ascertain what the impact of the case may have on [the client’s] immigration status in this country” (citation and internal quotation marks omitted)); Margaret McManus, The Legal Aid Society of New York, *Immigration Consequences of Criminal Conduct* (1985) (“Since criminal conduct, sometimes even without a conviction, may have serious immigration consequences for all Aliens, it

must be considered immediately.” (emphasis omitted)).

### **Treatises, Articles, and Practice Materials.**

In addition to the aforementioned standards, many authoritative treatises, articles, and practice materials have informed criminal defense lawyers for years that it is their professional duty to understand the immigration consequences of a client’s plea, and to provide the client with advice about entering a plea in light of those consequences. The Court in *Padilla* cited some of those publications, including an article from *amicus* NACDL’s journal *The Champion*, in support of its conclusion about prevailing professional norms. 130 S. Ct. at 1482. The Court also cited the 2004 third edition of Arthur W. Campbell, *Law of Sentencing*, § 13:23, at 555, 560 (3d ed. 2004), the first edition of which instructed defense counsel about this duty in 1978: “Counsel should also be aware that criminal conviction can result in . . . [a] client’s own deportation from the country.” *Id.* § 123, at 375 (1st ed. 1978).

Many other criminal defense publications similarly advise that “[an] attorney who suspects that his client is an alien has a duty to inquire and to protect his client’s immigration status.” 3 *Criminal Defense Techniques* § 60A.01 (Scott Daniels & Ellen Smolinsky Pall eds., 2002). One particularly notable example is Professor Anthony G. Amsterdam’s definitive treatise *Trial Manual for the Defense of Criminal Cases*, published by *amicus* NLADA, the American College of Trial Lawyers, and the ALI-ABA Committee on

Continuing Professional Education. Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* (1st ed. 1967).<sup>10</sup> It instructs defense counsel that “[n]o intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction,” *id.* § 204, at 2-146, including “[l]iability to deportation, if the defendant is an alien.” *Id.* § 205, at 2-148.

Similarly, practice materials for federal defenders have recognized for many years the duty to counsel a client about the advisability of entering a plea in light of the immigration consequences of the plea. The 1984 edition of *Defending A Federal Criminal Case*, an extensive practice guide published by the Federal Defenders of San Diego, Inc. (most recently updated and republished in 2010) states:

The immigration consequences of a criminal conviction for a client must be initially analyzed. Deportation of a legal resident alien frequently poses a more severe hardship than any prison sentence would. *Advising a client to plead guilty in an inappropriate case is ethically, and perhaps legally, professional malpractice. The criminal defense attorney should consult with immigration attorneys or*

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<sup>10</sup> *Trial Manual for the Defense of Criminal Cases* has been cited by federal courts in at least six judicial circuits as an authoritative resource on criminal defense practice. *E.g.*, *Dean v. Superintendent*, 93 F.3d 58 (2d Cir. 1996); *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978); *McSurely v. McClellan*, 426 F.2d 664 (D.C. Cir. 1970).



*examine secondary research sources to determine the immigration consequences of a guilty plea in any particular case.*

Federal Defenders of San Diego, Inc., *Defending A Federal Criminal Case*, § 12.01, at 12-1 (1984) (emphasis added). This manual goes on to cite several resources that federal defenders can consult to learn about the immigration consequences of a guilty plea, including Nancy Hollander, *Defending The Criminal Alien in New Mexico: Tactics And Strategy To Avoid Deportation*, 9 N.M.L. Rev. 45 (1978-79), and Wojciech P. Makowski, *Immigration Consequences of Criminal Convictions*, 8 Forum 5, at 26-34 (1981).

Through these treatises, articles, and practice materials, the defense community has made counsel aware for decades that "[a]ny time [she] thinks there is the remotest possibility that a client may be an alien, there is a duty to inquire and to protect that client's immigration status." Nancy Hollander & Kari Converse, *Immigration Implications for the Alien Defendant, Part II - Narcotics Offenses and Other Crimes*, The Champion at 16, 20 (June 1986) (hereinafter *Immigration Implications*). See also, e.g., American Council for Nationalities Service, *The General Practitioner - Pitfalls in Counseling Aliens and Immigrants*, 58 Interpreter Release 50, at 689-97 (Dec. 23, 1981) (describing importance of being aware of the deportation consequences of a client's plea); Ira S. Rubinstein & Ester Greenfield, *Immigration Consequences of Criminal Activity*, Washington State Bar News at 11-16 (July 1989) ("[A] thorough knowledge



of immigration laws and procedures is necessary to identify those cases where immigration strategy should be linked with criminal defense tactics to help the noncitizen client preserve his or her immigration status.”).

**B. An Extensive Array of Resources Has Long Been Available To Criminal Defense Lawyers To Enable Them To Effectively Advise Non-citizen Clients About The Immigration Consequences of Criminal Convictions.**

In addition to informing defense counsel about their duty to advise about immigration consequences, an extensive array of treatises, articles, manuals, practice guides, and other resources, including trainings and CLE programs, has provided defense counsel for decades with detailed information about the immigration consequences of various criminal convictions and strategies for effectively addressing these consequences. Competent defense counsel have long relied on these resources to fulfill their professional duty to fully advise their non-citizen clients about the immigration consequences of a plea.

**Treatises, Articles, and Manuals.** In addition to publications cited by the Court in *Padilla*, 130 S. Ct. at 1482, such as Scott E. Bratton, *Practice Points: Representing A Noncitizen In A Criminal Case*, 31 The Champion 61 (Jan./Feb. 2007), and the materials discussed above, a variety of written materials has been widely available over the years to help

defense counsel understand the particular immigration consequences of a client's plea.

Foremost is *amicus* NIP's treatise *Immigration Law and Crimes*, considered the national "Bible" for determining the immigration law implications of criminal cases. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* (1984-2012) (currently available on Westlaw). The availability of the 1984 first edition was widely publicized to criminal defense lawyers, including through a detailed review in *The Champion*. Michael James Snure, *Book Review*, *The Champion* at 18-20 (April 1985). The review declared the treatise "a must for any defense attorney representing a non-U.S. citizen" because it is "very broad, yet very detailed" and it "uncovers and treats numerous adverse immigration consequences that may be triggered by the most seemingly harmless and innocuous situations encountered everyday in the representation of traditional criminal defendants." *Id.* at 20. Another review described the treatise as offering "a lucid and well annotated exposition of the law, a detailed 'how to' analysis of the procedures, and much by way of practical comment and suggestion derived from experience." American Council for Nationalities Service, *New Publications*, 61 *Interpreter Releases* 28, at 576-77 (July 20, 1984). See also D. Hoyt Smith, *What Defenders Should Know About Immigration Law*, 2 *Washington Defender* 1, at 1 (1985) (reviewing *Immigration Law and Crimes*). In addition to NIP's treatise, California criminal defense attorney Norton Tooby has published many national

practice manuals for criminal defense lawyers. See, e.g., Norton Tooby & Katherine A. Brady, *Criminal Defense of Immigrants* (2001); Norton Tooby & Joseph J. Rollin, *Aggravated Felonies* (2006); Norton Tooby & Joseph J. Rollin, *Criminal Defense of Immigrants* (4th ed. 2007); Norton Tooby, *et al.*, *Tooby's Crimes of Moral Turpitude* (2008); Norton Tooby, *Tooby's Guide to Criminal Immigration Law* (2008).

Since 1990, *amicus* Immigrant Legal Resource Center (ILRC) has published a treatise on immigration consequences for criminal defense practitioners in states covered by the Ninth Circuit. Katherine A. Brady, *Defending Immigrants In The Ninth Circuit: Impact of Crimes Under California And Other State Laws* (10th ed. 2011). See also Letter from Katherine A. Brady, Senior Staff Attorney, ILRC, at 1 (July 20, 2012) (hereinafter *Brady Letter*).<sup>11</sup> From 1990 through the present, ILRC and colleagues have co-authored a chapter on the representation of non-citizen defendants in the widely distributed publication *California Criminal Law Procedure and Practice*, which is published by the University of California and the State Bar of California. *Brady Letter* at 1. Since 1998, *amicus* IDP has published a treatise aimed

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<sup>11</sup> Letters, memoranda, and e-mails cited herein are on file with counsel for *amici* and contain information that the Court may judicially notice. In order to avoid inconvenience to the Court, *amici* have not sought permission to lodge these materials with the Clerk of the Court at this time. *Amici* are prepared to lodge copies of these materials should the Court wish.

specifically at New York practitioners, Manuel D. Vargas, *Representing Immigrant Defendants In New York* (5th ed. 2011), which is distributed free of charge to every public defender office in New York State. Memorandum from Benita Jain, Co-Director, IDP, at 1 (June 30, 2012) (hereinafter *Jain Memorandum*).

Law reviews, bar journals, and defender-oriented publications like *The Champion* have also published countless articles over the years providing defense attorneys with detailed information about the immigration consequences of specific criminal convictions. These articles include a two-part series in the *Champion* that provided “the defense attorney with a basic introduction to the immigration consequences of criminal convictions.” Alan Vomacka, *Immigration Considerations for the Criminal Defense Lawyer*, *The Champion* at 9 (Apr. 1982); Alan Vomacka, *Immigration Considerations for the Criminal Defense Lawyer, Part II*, *The Champion* at 4 (May 1982). Another two-part *Champion* series provided a detailed discussion of deportable crimes under the Immigration and Nationality Act and offered sample questions for client interviews. Nancy Hollander & Kari Converse, *Immigration Implications for the Alien Defendant, Part I – Crimes of Moral Turpitude*, *The Champion* at 29 (May 1986); *Immigration Implications* at 16. An American Criminal Law Review article similarly acquainted counsel with convictions most likely to lead to deportation and offered strategies for avoiding a client’s deportation. Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the*

*Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys*, 23 Am. Crim. L. Rev. 425 (1986).<sup>12</sup>

**Trainings, CLE Seminars, Practice Guides, and Free Technical Assistance.** Since 1986, *amicus* NIP has offered free technical assistance to thousands of federal and state criminal defense lawyers from all 50 states in connection with their representations of non-citizens in federal and state criminal proceedings. Letter from Dan Kesselbrenner, Executive Director, NIP, at 1 (July 11, 2012) (hereinafter *Kesselbrenner Letter*). In addition, NIP has conducted trainings and CLE seminars on the immigration consequences of criminal convictions in 43 states, the District of Columbia, Puerto Rico, and the

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<sup>12</sup> Many similar articles have been published over the years. See, e.g., Tova Indritz, *Representing an Alien in a Criminal Case: Obtaining the Sentencing Court's Recommendation Against Deportation*, XVI The New Mexico Trial Lawyer, No. 1 (1988); Kari Converse, *Keeping Dorothy in Kansas After Ozkok: New Strategies for Defending Non-Citizens*, 13 The Champion 8 (Mar. 1989); Alfred Zucaro, Jr. & Beth L. Mitchell, *Criminal Convictions: The Immigration Consequences*, 63 Fla. B.J. 36 (May 1989); Ira J. Kurzban, *The Immigration Act of 1990*, 15 The Champion 5 (Apr. 1991); Robert Frank, *Criminal Defense of Foreign Nationals*, 167 N.J. Law 36 (Feb.-Mar. 1995); Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, 21 The Champion 10 (Aug. 1997); Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts*, 17 Law & Ineq. 567 (1998); Steve Brazelton, *Immigration Pitfalls of the Plea Bargain: Criminal Attorneys Beware*, 7 Nev. Law 13 (Nov. 1999); and Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Parts I-III*, 26 The Champion 12, 20, 22 (Jan.-Feb. 2002).



U.S. Virgin Islands, which have been attended by more than 5,000 practitioners from all 50 states. *Id.* at 2-3. Since 1979, *amicus* ILRC has provided a nationwide consultation service called the “Attorney of the Day,” in which immigration questions are answered by expert staff attorneys for a fee. *Brady Letter* at 3. In addition, since 1991, ILRC has regularly presented CLE seminars and more recently webinars to criminal defense attorneys throughout California, and has presented similar trainings in other Ninth Circuit states. *Id.* at 2-4. These trainings include more than 50 presentations by Katherine Brady, a national expert on the interplay of criminal and immigration law, for county public defender offices in California. *Id.* at 2. Since its founding in 1997, *amicus* IDP has provided extensive publications and trainings for criminal defense lawyers regarding the immigration consequences of convictions. *Jain Memorandum* at 1-2. Also since 1997, IDP has operated a free “hotline” that offers individualized telephone assistance concerning the immigration consequences of criminal convictions. *Id.* The hotline has responded to requests for assistance in about 18,000 cases; nearly half of these requests came from criminal defense attorneys and advocates or their clients. *Id.* at 1, 3. IDP has also trained dozens of in-house immigrant defense experts at public defender organizations in Florida, Maryland, Pennsylvania, New York, Vermont, and other states. *Id.* at 2.

In addition to *amici*’s trainings and assistance, bar associations, public defender offices, lawyers, and



law schools around the country have organized countless trainings and CLE seminars for both federal and state defense counsel. For example, since at least 2002, the Public Defender of Cook County, Illinois has provided training to assistant public defenders on the immigration consequences of criminal convictions. E-mail from Lester Finkle, Chief, Legal Resource Division, Law Office of the Cook County Public Defender (July 20, 2012). Since 1992, Jay Stansell, a former immigration attorney who is now a federal defender in Seattle, Washington, has conducted many trainings with state and federal defense attorneys on the immigration consequences of criminal convictions, and in 1992 he co-authored a training manual, *Immigration Consequences of Criminal Convictions*, that was used in these trainings. See Letter from Jay W. Stansell, Assistant Federal Public Defender, Western District of Washington, at 1-3 (July 17, 2012).

The New York State Defenders Association (NYSDA) has responded to more than 5,000 requests for assistance with immigration issues in criminal cases since 1978, and during the past decade it has sponsored at least 20 trainings annually informing criminal defense counsel in New York State about the immigration consequences of criminal convictions. Letter from Jonathan E. Gradess, Executive Director, NYSDA (July 18, 2012). Even before it began these trainings, NYSDA published materials on immigration consequences of criminal convictions collected from all 50 states in its magazine *The Defender* and its newsletter *Public Defense Backup Center Report*,

which is made available to every lawyer providing public defense services in New York State. *Id.*

Moreover, beginning in the late 1980s, the Legal Aid Society for the City of New York, Criminal Defense Division, and the Los Angeles County Public Defender, provided in-house resources and periodic trainings on the immigration consequences of criminal convictions. Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, *et al.* in *St. Cyr*, No. 00-767, at App. 17-18. Beginning in 1987, the Immigration Law Clinic at the University of California, Davis, School of Law, sponsored training sessions for criminal defense lawyers on immigration issues, including for the California Public Defenders Association. *Id.* at App. 18. And the ABA has documented examples of similar state bar association CLE seminars from across the country, including in states with large immigrant populations such as Arizona, Colorado, Florida, and Texas. Brief of the American Bar Association As *Amicus Curiae* In Support of Petitioner in *Padilla*, No. 08-651, at App. 16a-30a. These trainings and CLE seminars have been supplemented by countless written materials distributed to many federal and state public defenders, and private defense lawyers, across the country. See, e.g., Katherine A. Brady & David S. Schwartz, *Public Defenders Handbook On Immigration* (California Public Defenders Association 1988); Jan Joseph Bejar, *Representing Aliens in Criminal Proceedings* (training material for Criminal Justice Act Seminar, June 4, 1991); Jim Benzoni, *Defending*

*Aliens in Criminal Cases* (training material for Iowa CLE programs 1994-1997).

In short, not only has the basic duty to inform criminal defendants of the immigration consequences of a plea existed for many years, but criminal defense lawyers have long had ready access to a vast collection of educational materials and trainings that have provided competent counsel with more than sufficient resources to fulfill that professional duty.

**C. These Professional Standards And Resources Arose As A Result of Immigration Laws That Have Historically Imposed The Harsh Penalty of Deportation On A Steadily Increasing Number of Non-citizen Defendants.**

The longstanding prevalence of the professional norms and resources discussed above reflects the historically severe and often mandatory nature of deportation, which existed under federal immigration law long before the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. As this Court has noted, “deportable offenses have historically been defined broadly,” *St. Cyr*, 533 U.S. at 295, and even before 1996 deportation was virtually inevitable for certain categories of non-citizens convicted of various offenses.

For example, immigration laws have long made deportation virtually inevitable if not mandatory for non-citizens with convictions for certain drug offenses. Under the Immigration and Nationality Act of 1952 (1952 Act), Pub. L. No. 82-414, 66 Stat. 163, certain non-citizen offenders facing deportation were eligible for relief from deportation through the judicial recommendation against deportation (JRAD) procedure, which allowed a judge at sentencing to recommend against deportation. However, with minor exceptions the JRAD procedure did not apply to non-citizens convicted of a narcotics offense. *Padilla*, 130 S. Ct. at 1480 n.5. Thus, a conviction for the possession of more than 30 grams of marijuana could render a non-citizen automatically deportable, see *Immigration Implications* at 16 & n.2, and a conviction for the possession of any amount of marijuana could render a non-citizen automatically excludable. 8 U.S.C. § 1182(h) (1981).

With respect to all types of convictions that posed a risk of deportation or exclusion, the need for competent advice about those risks increased with the enactment of several changes to the 1952 Act beginning in the late 1980s. In 1988, Congress expanded the list of deportable offenses by adding convictions for any "aggravated felony," Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342-44, 102 Stat. 4181, 4469-71. Only two years later, Congress entirely eliminated the JRAD procedure. *Padilla*, 130 S. Ct. at 1480. See also Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050.

At the same time, it expanded the definition of “aggravated felony,” *id.* § 501(a), 104 Stat. 5048, and made deportation mandatory for many deemed convicted of such aggravated felonies, such as persons who served more than five years in prison. *Id.* § 511(a), 104 Stat. 5052. In 1994, Congress further expanded the definition of “aggravated felony” such that the original list of seven deportable offenses grew to sixteen. Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Pub. L. No. 103-416, § 2224, 108 Stat. 4305, 4320-24.

In addition, although certain non-citizen offenders could seek relief from deportation under § 212(c) of the 1952 Act, which granted the Attorney General discretion to terminate deportation proceedings, this relief was unavailable to those who had lived in the United States less than seven consecutive years prior to completion of their deportation proceedings, 1952 Act, § 212(c), 66 Stat. 187; *see also Lok v. INS*, 681 F.2d 107, 108-110 (2d Cir. 1982) (discussing seven-year requirement), and after 1990 it was unavailable to those who had served more than five years in prison. IMMACT, § 511(a), 104 Stat. 5052. Moreover, even when § 212(c) was technically available, applications for § 212(c) were frequently not granted, as this Court has observed. *St. Cyr*, 533 U.S. at 296 n.5 (discussing statistics showing nearly 50% of § 212(c) applications between 1989 and 1995 were not granted). In 1996, § 212(c) relief was entirely eliminated. IIRIRA, § 240A, 110 Stat. 3009-597.



These changes in immigration law contributed to a steady annual increase in the number of non-citizens deported for criminal or narcotics convictions from 1981 to 1996, such that more than 185,000 of these deportations occurred during that period. INS, *Statistical Yearbook of the INS*, 1996, Section VI, Table 66, at 183 (October 1997). These numbers continued to increase after 1996. INS, *Statistical Yearbook of the INS*, 2000, Section VI, Table 66, at 248, 252 (September 2002); INS, *Statistical Yearbook of the INS*, 2010, Enforcement Actions, Table 38, at 96, 99, 102 (August 2011).

In response to these immigration laws, and the historically harsh penalty of deportation they often imposed, the bar and defender community developed professional standards universally requiring defense counsel to fully advise non-citizen clients about the deportation risk of a criminal conviction. These professional standards spawned a vast array of resources that have long enabled competent defense counsel to effectively comply with these standards. These well-established professional norms demonstrate that *Padilla's* holding was dictated by *Strickland* because constitutionally competent defense counsel has been professionally obligated for many years to fully advise non-citizen clients about the immigration consequences of a criminal plea.

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## CONCLUSION

The Court should reverse the judgment of the Court of Appeals and hold that *Padilla* applies retroactively to petitioner's claim and the claims of other similarly situated persons.

Respectfully submitted,

JOSHUA L. DRATEL  
NATIONAL ASSOCIATION  
OF CRIMINAL  
DEFENSE LAWYERS  
1501 K Street, N.W.  
Washington, D.C. 20005

SEJAL R. ZOTA  
NATIONAL IMMIGRATION  
PROJECT OF THE  
NATIONAL LAWYERS GUILD  
14 Beacon Street, Suite 602  
Boston, Massachusetts 02108

DAWN M. SEIBERT  
IMMIGRANT DEFENSE PROJECT  
28 West 39th Street,  
Suite 501  
New York, New York 10018

EDWIN A. BURNETTE  
NATIONAL LEGAL AID &  
DEFENDER ASSOCIATION  
1140 Connecticut Avenue, N.W.  
Washington, D.C. 20036

JEFFREY S. TRACHTMAN  
CRAIG LOUIS SIEGEL\*  
JENNIFER E. BATTERTON  
RACHEL L. FEINBERG  
SARAH N. ROSEN  
KRAMER LEVIN NAFTALIS  
& FRANKEL LLP  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9100  
csiegel@kramerlevin.com

*\*Counsel of Record*

*Counsel for Amici Curiae*

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**APPENDIX A: Separate Statements  
Of Interest For *Amici Curiae***

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,000 members nationwide, and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. Founded in 1958, NACDL promotes criminal law research, advances and disseminates knowledge in the area of criminal practice, and encourages integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the constitutional standards for effective criminal defense counsel.

The National Legal Aid & Defender Association (NLADA) is the nation's leading advocate for frontline legal aid and defender attorneys and other equal justice professionals who make a difference in the lives of low-income clients and their families and communities. Representing legal aid and defender programs, as well as individual advocates, NLADA is privileged to be the oldest and largest national, non-profit membership association devoting 100 percent of its resources to serving the broad equal justice community. NLADA and its members are keenly aware of the need to accurately advise a client of the consequences

of a plea agreement that are significant to the client's ability to make an informed decision, such as the immigration consequences at issue in this case. Indeed, NLADA has developed performance guidelines, cited in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010), for criminal defense representation, that specifically call on defense attorneys to advise their clients about such significant consequences.

NLADA has worked with NACDL and IDP to highlight the important responsibility to fully advise our clients, and message to all involved in the criminal justice community, as well as the community at large, the crucial nature of such advisements. NLADA is a founding partner of the Defending Immigrants Partnership, which was established in 2002 in order to assist individual defenders and defender organizations with immigration-related issues. While working to continue this and like partnerships, NLADA has worked with Criminal Justice Act attorneys, and federal and state defenders, to develop and maintain accessible resources to better aid in comprehensive advice to our clients on immigration and other significant life consequences. It is our interest that equal justice extend to those who did not receive such important and ethically required advice before the announcement of the Court's decision in *Padilla*.

The Law Office of the Cook County Public Defender is the second largest public defender office in the nation. Providing representation for the indigent in Chicago and its suburbs, the Office has a caseload that exceeds 200,000 cases annually. Anyone who is

indigent qualifies for the services of the Public Defender; no one is disqualified due to his or her citizenship status. The Public Defender of Cook County believes that effective assistance of counsel must be provided to every client, regardless of national origin. Since at least 2002, training has been provided to assistant public defenders on the immigration consequences of criminal convictions. A sizeable number of non-citizens are among the office's clients, and each deserves the same level of effective assistance of counsel that is guaranteed by the Sixth Amendment.

The Public Defender's Office for the Eleventh Judicial Circuit of Florida (PD11) is the largest public defender's office in Florida and one of the six largest in the country. Located in Miami-Dade County, Florida, PD11 is the primary provider of indigent criminal defense services in Miami, resulting in a caseload that has ranged between 85,000-100,000 cases annually during the past few years. Given Miami's significant immigrant/non-citizen population and PD11's constitutional and ethical responsibilities, PD11 sees it as essential that it participate in the evolving jurisprudence relating to the immigration consequences of criminal convictions.

The Los Angeles County Public Defender's Office, with over 700 attorneys, is the largest office of trial counsel for criminal defendants in the State of California. The Office's mission is to protect the rights of all its clients, which includes adequately and competently advising non-citizen clients of the immigration consequences of criminal convictions. Accordingly, as

part of continuing education for attorneys, the Office provides resource materials, trainings, and in-house technical assistance on issues relating to the immigration consequences of criminal convictions.

The Kentucky Department of Public Advocacy (KDPA) is the statewide public defender agency for the Commonwealth of Kentucky. KDPA is responsible for defending the indigent accused, and it represents clients in more than 150,000 cases a year. Being mostly rural, Kentucky has an ever increasing number of undocumented workers coming to the state to work in agricultural jobs. As the immigrant population in Kentucky increased, so too did the number of immigrants who appeared as defendants on public defender dockets. KDPA represents many clients facing the harsh penalties imposed by our immigration statutes, such as those described in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), and has made it a priority to ensure that the immigration consequences of a plea are well understood by both the immigrant and his public defender counsel.

The Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services provides training and case-specific consultation on individual cases regarding immigration consequences of criminal conduct for the nearly 3,000 public defenders and private, court-appointed, attorneys in Massachusetts who represent indigent defendants. The Committee for Public Counsel Services (CPCS) is statutorily mandated to provide counsel for indigent defendants in criminal proceedings in Massachusetts state courts. A



significant percentage of CPCS' clients are non-citizens potentially affected by the recent decision of this Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Since 1988, the CPCS Performance Guidelines Governing the Representation of Indigent Persons in Criminal Cases have required all court-appointed attorneys to advise their clients of any potential immigration consequences prior to resolution of their cases; since 1999, CPCS has provided expert assistance and resources to such attorneys in order for them to fulfill this requirement. We have an interest in this case due to our belief that effective assistance of counsel has included advice about the immigration consequences of criminal conduct for many years, because criminal defense practice standards have long required such advice.

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1,800 public defenders, legal aid attorneys, 18-B counsel, private practitioners, and others throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 6,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. New York State contractually obligates NYSDA, through the Backup Center, "to review, assess and analyze the public defense system in the state, identify problem



areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, NYSDA has issued numerous reports identifying trends and problems and suggesting norms and best practices to improve the state's public defense system.

From the inception of the Backup Center, NYSDA has sought to improve the quality of representation provided to foreign nationals. In 1997, recognizing that proper criminal defense representation of individuals who are not U.S. citizens was growing more complicated, NYSDA announced the creation of a criminal defense immigration project that eventually became the freestanding Immigrant Defense Project (IDP). NYSDA's current Criminal Defense Immigration Project (CDIP) continues NYSDA's mission of improving the representation offered to clients, including foreign nationals, in criminal and family court matters. The CDIP provides training and consultation to criminal defense lawyers concerning issues at the intersection of immigration law and criminal law.

The Legal Aid Society (Legal Aid), located in New York City, is the nation's oldest and largest not-for-profit law firm for low income persons in New York City. Legal Aid provides a full range of legal services including criminal defense work, as well as civil legal services. Legal Aid's Criminal Defense Practice is one of the largest public defender programs in the country and serves as the primary

provider of indigent defender services in New York City. The Civil Practice's city-wide Immigration Law Unit, established decades ago, advises immigrants and criminal defense attorneys of the immigration consequences of criminal case dispositions. The Unit also specializes in representing detained and non-detained non-citizens with criminal convictions in removal proceedings before the immigration court, the Board of Immigration Appeals, and the federal district and circuit courts.

The Oregon Criminal Defense Lawyers Association (OCDLA) is a 1,337-member non-profit organization of private criminal defense attorneys, public defenders, investigators, and others engaged in Oregon and federal criminal defense and juvenile defense. OCDLA advocates for the interests of its members, the criminal defense bar, and criminal defendants, and provides education and training on criminal defense law and practice.

The New Mexico Criminal Defense Lawyers Association (NMCDLA) is a statewide non-profit voluntary professional membership association of over 525 New Mexico attorneys, including both public and private criminal defense lawyers who represent accused persons in federal, state, and Indian tribal courts. NMCDLA has an interest in the constitutional guarantees of fairness in the criminal justice system. Dedicated to improvement of the criminal justice system, NMCDLA provides support, education, and training for attorneys who represent persons accused of crime. Specifically, NMCDLA has provided extensive

training on the immigration consequences of criminal convictions both before and after the 2004 decision of the New Mexico Supreme Court in *State v. Paredes*, 136 N.M. 533, 101 P.3d 799 (2004), cited by this Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). NMCDLA also advocates for fair and effective criminal justice in the courts, the legislature, and in the community. NMCDLA endeavors to provide courts with its members' perspective on issues important to the criminal and juvenile justice systems, presents its views in the legislature and in the community for fair and effective criminal justice for all, and provides support to its members in the representation of their individual clients, including continuing legal education, and communication and assistance to its members. NMCDLA is affiliated with NACDL.

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is the primary organized voice for the criminal defense bar in New Jersey. The ACDL-NJ consists of lawyers from the State and Federal Office of the Public Defender and private practitioners engaged in state and federal criminal practice. The ACDL-NJ's mission includes protecting and ensuring individual rights guaranteed by the New Jersey and United States Constitutions, confronting issues arising from the honest, ethical and zealous defense of the accused, and encouraging cooperation among criminal defense lawyers engaged in the furtherance of those objectives.

The Hall County Public Defender is the Hall County Nebraska office/agency charged with representing indigent criminal defendants. It represents approximately 1,500 clients per year. About a quarter of its clients are immigrants to the United States, whether documented or not. Many of its clients have families and work within Hall County. Immigration consequences of convictions are often-times harsh and split families and communities. The Hall County Public Defender advises clients of the harsh consequences of convictions on their immigration status. It also devotes resources to training attorneys about the immigration consequences of criminal convictions.

The Lancaster County Public Defender's Office is the organization responsible for indigent criminal defense in Lancaster County, Nebraska (population 290,000). Nebraska has become fifth in refugee resettlement per capita when compared with states of similar population, and half of the state's refugees for the last 18 years resided in Lancaster County. Each year the office is appointed to represent over 7,000 clients; approximately 8 percent to 10 percent of these clients are not citizens of the United States. In recognition of the harsh nature of immigration consequences, the Public Defender's Office incorporates immigration advice for non-citizen clients into public defender services, and trains its attorneys in the provision of this advice.

The Texas Fair Defense Project (TFDP) is a non-profit organization based in Austin, Texas. TFDP

works to improve the fairness and accuracy of the criminal justice system in Texas, with a primary focus on improving access to counsel and the quality of representation provided to poor people accused of crime. TFDP's work addresses protection of the Sixth Amendment in Texas state courts and issues related to local practices and procedures affecting indigent defendants, including indigent defendants who are not citizens of the United States. TFDP also was closely involved in the development and drafting of Performance Guidelines for Non-Capital Criminal Defense Representation that were adopted by the State Bar of Texas Board of Directors in 2011. The Texas Performance Guidelines were modeled on the ABA Criminal Justice Standards and NLADA Performance Guidelines discussed in this brief.

The Washington Defender Association (WDA) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are working to improve the quality of indigent defense in Washington State. The purpose of WDA, as stated in its bylaws, is "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights and to promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel." In 1999, WDA created the Immigration Project to defend and advance the rights of non-citizens within the Washington State criminal



justice system and non-citizens facing the immigration consequences of crimes.

The Office of the Defender General of Vermont has provided statewide representation in criminal cases to the indigent since 1972. The Office provides a full range of criminal defense services, including advice on immigration consequences of criminal convictions. Since 2007, it has had in-house immigration lawyers providing such advice on a statewide basis. The Office has also provided regular training on the immigration consequences of criminal convictions to all criminal defense attorneys and investigators.

The Neighborhood Defender Service of Harlem (NDS) is a lead innovator in holistic public defense practice. NDS represents clients using a team-based, client-centered, holistic defense model. A core aspect of holistic representation is the commitment to search for the underlying issues that bring clients into contact with the criminal justice system, and to work with clients to help to avoid or minimize future contact with the system. As a part of its holistic approach, NDS has incorporated immigration defense and immigration services into the representation it has provided its non-citizen clients for many years, long before *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Since 2008, NDS has employed an in-house immigration attorney to consult with clients.

Since 2004, the Florence Immigrant and Refugee Rights Project (FIRRP) has provided free legal services to over 10,000 immigrants, refugees, and U.S.



citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals (BIA), and the Ninth Circuit Court of Appeals. A large percentage of FIRRP's clients are affected by the immigration consequences of criminal convictions and the advisals given to them by their criminal defense attorneys.

The Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional and human rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP supports, trains and advises both criminal defense and immigration lawyers, as well as immigrants themselves, on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigrants in the nation's criminal justice system receive competent legal counsel regarding the immigration consequences of criminal convictions.

The Immigrant Legal Resource Center (ILRC), founded in 1979, is a national back-up center that provides technical assistance, training, publications, and assistance in advocacy to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading

authority on the intersection between immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*), which has been cited by the Ninth Circuit Court of Appeals and the California Supreme Court, and a chapter entitled *Representing a Non-citizen Criminal Defendant in California Criminal Law Procedure and Practice*. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before this Court.

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**APPENDIX B: Sample Trainings &  
Resources On The Immigration  
Consequences Of Criminal Convictions**

I. National Trainings & Written Resources (in chronological order)

Wojciech P. Makowski, *Immigration Consequences of Criminal Convictions*, 8 Forum 26 (1981).

Larry Ainbinder, Federal Defenders of San Diego, Inc., *Special Considerations in Representing the Non-Citizen Defendant*, in *Defending a Federal Criminal Case* (1983-2012).

Training: *Immigration Consequences of Criminal Convictions*, The National Immigration Project of the National Lawyers Guild (NIPNLG), Boston, Mass., CLE, Jan. 28, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, San Francisco, Cal., CLE, Feb. 4, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Los Angeles, Cal., CLE, Feb. 11, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Sacramento, Cal., CLE, Mar. 17, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, New York, N.Y., CLE, May 11, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Portland, Or., CLE, June 25, 1984.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Seattle, Wash., CLE, June 25, 1984.

Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* (1984-2012).

6th Annual Immigration Law Conference, The Federal Bar Association, Washington, D.C., Feb. 20, 1985.

*District Court Remedies in Immigration Cases (Conference)*, NIPNLG, Atlanta, Ga., Mar. 13, 1985.

Training: *U.S. Immigration Law – What You Should Know*, Immigration Information Systems, Inc., Washington, D.C., New York, N.Y., and Los Angeles, Cal., Apr., May and June 1985.

*Federal Statutes Concerning Criminal Conduct, as Applicable to the Immigration Bar*, Texas American Immigration Lawyers Association Spring Conference, South Padre Island, Tex., Apr. 11-14, 1985.

*Annual Immigration and Naturalization Institute*, Practising Law Institute (PLI), San Francisco, Cal., Nov. 1985.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Washington, D.C., CLE, Nov. 18, 1985.

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Miami, Fla., CLE, Dec. 6, 1985.

Maryellen Fullerton & Noah Kinigstein, *Strategies for Ameliorating the Immigration Consequences of Criminal Convictions*, 23 Am. Crim. L. Rev. 425 (1986).

Training: *Suspension of Deportation: Tactics, Practice, and Procedure*, NIPNLG, Denver, Colo., June 11, 1986.

*Representing Detained Central American Refugees*, National Lawyers Guild (NLG) 50th Annual Convention, Washington, D.C., May 20-25, 1987.

C. Gordon *et al.*, *Immigration Law and Procedure* (1988-2012).

Kari Converse, *Keeping Dorothy in Kansas After Ozkok: New Strategies for Defending Non-Citizens*, The Champion at 8 (Mar. 1989).

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, South Padre Island, Tex., CLE, Sept. 29, 1989.

Training: *Trial Practice Skills: Drug Conviction 212(c) Waivers*, NIPNLG, Albuquerque, N.M., CLE, Jan. 19, 1990.

Training: *Immigration Consequences of Criminal Conduct: Drug Convictions, Weapons Offenses, Aggravated Felonies and Crimes Involving Moral Turpitude*, NIPNLG, Austin, Tex., CLE, May 30, 1990.

Training: *Immigration Consequences of Criminal Conduct: Drug Convictions, Weapons Offenses, Aggravated Felonies and Crimes Involving Moral*

*Turpitude*, NIPNLG and Central American Refugee Defense Fund Visa Denial Project, Austin, Tex., June 1990.

Training: *Trial Tactics, Practice and Substance: 212(c) Waivers of Excludability*, NIPNLG, San Francisco, Cal., CLE, Nov. 10, 1990.

Jan Bejar, *Representing Aliens in Criminal Proceedings* in Criminal Justice Act Seminar Materials, at 1, 42-43, 61-66 (June 4, 1991).

Training: *Specialized Issues in the Immigration Act of 1990*, NIPNLG, Seattle, Wash., CLE, July 31, 1991.

Training: *Defending Detained And Convicted Persons In Deportation Proceedings*, NIPNLG, The Washington Lawyers' Committee for Civil Rights Under Law, AILA, and the District of Columbia Bar, Washington, D.C., Sept. 13, 1991.

*Representing Clients Who Are Not United States Citizens: Immigration Consequences of Convictions and Appellate Considerations* (The Legal Aid Society Criminal Appeals Bureau, 1992).

Training: *Defending Against Deportation*, NIPNLG, Chapel Hill, NC, CLE, Jan. 31, 1992.

*Immigration Consequences of Crime*, University of Washington School of Law, Apr. 11, 1992.

Training: *Deportation Hearing Skills Training*, Immigrant Legal Resource Center, Catholic Charities Immigrant and Refugee Program, and the United Network for Immigrant & Refugee Rights, Chicago, Ill., Mar. 1992.



*Immigration Consequences of Criminal Convictions*, California Conference on Immigration Law, AILA, San Francisco, Cal., Oct. 9-10, 1992.

*Prison Isn't the Only Bad Thing They Can Do To Your Client: Forfeiture Housing, and Immigration Implications of Drug Charges*, National Legal Aid & Defender Association (NLADA) 70th Annual Conference, Toronto, Canada, Nov. 14, 1992.

Training: *Immigration Consequences of Crime*, Seattle-King County Bar Association, Seattle, Wash., Oct. 21, 1993.

Training: *Justice for Respondents in Immigration Proceedings: Contesting Deportability and 212(c) Waivers for Criminal Offenders*, NIPNLG, New York City, N.Y., CLE, Aug. 4, 1993.

Memorandum from the ABA, Coordinating Committee on Immigration Law, to Interested Public Defenders, re: Crime-related Immigration Provisions Enacted This Session, Dec. 7, 1994.

Training: *Immigration Consequences of Criminal Convictions*, Northwest Immigrant Rights Project (NWIRP), Seattle, Wash., Jan. 18, 1994.

Training: *Immigration Consequences of Criminal Conduct*, NIPNLG, San Antonio, Tex., Feb. 11, 1994.

Training: *How to Protect Your Client from the Immigration Consequences of Criminal Convictions*, NIPNLG, San Francisco, Cal., June 25, 1994.

Training: *Importance of Immigration Considerations when Representing Juvenile Non-citizen Offenders*, Washington Defenders Association, Seattle, Wash., Oct. 21, 1994.

National Seminar for Federal Defenders, Federal Judicial Center, 1995.

Training: *Firearm Offenses and 212(c) Relief*, Washington Association of Criminal Defense Lawyers, Seattle, Wash., Mar. 31, 1995.

William Schwarzer & Robb Jones, *Criminal Convictions and their Immigration Consequences*, National Seminar for Federal Defenders, Denver, Colo., March-April 1995.

Jeffrey B. Faweli & Robert S. White, *Effects of Recent Immigration Legislation on Criminal Aliens & Defense Practitioners*, *The Champion* at 10 (Sept./Oct. 1995).

11 *BNA Crim. Prac. Man.* 4, Feb. 12, 1997.

Training: Rick Averwater, Doug Weigle & Tanya Myers, *What a Criminal Defense Lawyer Must Know about the Immigration Consequences of Criminal Convictions*, Mid-South Chapter of the Federal Bar Association, Annual Immigration Seminar, May 17, 2007.

Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, *The Champion* at 10 (Aug. 1997).

Training: *Immigration Consequences of Drug Convictions*, Federal Public Defender Services, Oct. 1997.

Ramirez, Capriotti, Kay & Unger, *Small-Time Crime, Big-Time Trouble: The New Immigration Laws*, 13 *Crim. Just.* 4 (1998).

Training: *Immigration Consequences of Criminal Convictions*, NLADA, 1998.

Training: *Immigration Consequences of Criminal Convictions*, NLADA, Dec. 12, 1998.

B. John Ovink, *Why a Plea Bargain May No Longer Be a Bargain for Legal Permanent Resident Aliens*, 46 *Fed. Law* 49 (May, 1999).

William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, *The Champion* at 12 (June 1999).

Training: *The War on Immigrants*, Federal Public Defender Services, June 1999.

Training: *Investigation, Prosecution and Rights of Non-Citizens*, Federal Public Defender Services, Sept. 1999.

Training: *Immigration Consequences of Criminal Conduct*, NIPNLG, Oct. 13, 1999.

Trainings: *Sample National and Regional Trainings on Immigration Consequences of Criminal Convictions*, Administrative Office of the United States Courts, Savannah, Ga., Jun. 3-5, 1999; St. Thomas, V.I., Apr. 27, 2000; New Orleans, La., Jun. 6, 2000; Scottsdale, Ariz., Sept. 18-20, 2003; Los Angeles, Cal., Sept. 4-5, 2008).

Tova Indritz, "Immigration Consequences of Criminal Convictions," *Cultural Issues in Criminal Defense* (J. Connell & R. Valladares, eds. 2000).

Kari Converse, "Defending Aliens in Criminal Cases," *Criminal Defense Techniques* (Scott Daniels & Ellen Smolosky Pall, eds. 2000).

Training: *Immigration Consequences of Criminal Convictions*, National Association of Criminal Defense Lawyers (NACDL), Aug. 4, 2000.

Training: *Immigration Consequences of Criminal Conduct*, NIPNLG, Nov. 1, 2000.

Robert J. McWhirter, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (2001).

Anna Marie Gallagher, *Immigration Consequences of Criminal Convictions: Protecting Your Client's Immigration Interests in Criminal Proceedings*, Immigration Briefings 1 (April 2001).

Norton Tooby & Katherine Brady, *Criminal Defense of Immigrants* (2001-2007).

Immigration Consequences of Convictions Checklist, Immigrant Defense Project (IDP), 2001-2012.

Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Part I*, The Champion at 12 (Jan./Feb. 2002).

Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Part II*, The Champion at 20 (Mar. 2002).

Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Part III*, The Champion at 22 (Apr. 2002).

Training: *Human Rights Consequences of not Being American*, Federal Public Defender Services, June 2002.

Norton Tooby, Jennifer Foster & Joseph J. Rollin, *Crimes of Moral Turpitude* (2002-2008).

Training: *Immigration Consequences of Criminal Convictions*, NLADA, Nov. 2003.

Peter Markowitz, *Practice Tips to Avoid Aggravated Felonies* (2003).

Norton Tooby & Joseph J. Rollin, *Aggravated Felonies* (2003-2006).

Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541 (2004).

Manuel D. Vargas, *Tips on How to Work With an Immigration Lawyer to Best Protect Your Noncitizen Defendant Client* (2004).

Robert McWhirter, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (2d ed. 2004).

Norton Tooby & Joseph J. Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Offenses* (2005).

Dan Kesselbrenner & Sandy Lin, NIPNLG, *Selected Immigration Consequences of Certain Federal Offenses* (2005).

Training: *Immigration Consequences of State Criminal Convictions*, Defending Immigrants Partnership (DIP) July 14-15, 2005.

DIP, *Representing Non-citizen Criminal Defendants: A National Guide by the Defending Immigrant Partnership* (2005-2012).

Training: *Immigration Consequences of Criminal Convictions*, DIP, July 13-14, 2006.

Training: *Defending Against Immigration Consequences of Criminal Dispositions*, NLADA, Nov. 9, 2006.

Training: *Immigration Criminal Law*, NLADA, Feb. 22, 2007.

Rick Averwater *et al.*, Federal Bar Association, *What a Criminal Defense Lawyer Must Know about the Immigration Consequences of Criminal Convictions*, Mid-South Chapter of the Federal Bar Association – Annual Immigration Seminar, May 17, 2007.

Training: *Immigration Consequences of State Criminal Convictions*, DIP, Las Vegas, Nev., Sept. 27-28, 2007.

Training: *Immigration Consequences of State Criminal Convictions*, DIP, Sept. 2008.

Training: *Immigration Consequences of Criminal Convictions*, NLADA, Nov. 2008.

Training: *Immigration Law and Enforcement in the Federal Courts*, Federal Public Defender Services, Dec. 2008.



ABA Commission on Immigration *et al.*, *What All Attorneys Should Know About Immigration Consequences of Criminal Convictions for Non-Citizen Clients*, CLE Jan. 29, 2009.

*Ethics for Criminal Attorneys Representing Non-U.S. Citizens*, Annual Immigration Seminar, May 16, 2009.

II. State Trainings & Written Resources (by state and in chronological order)

Alabama

Training: *Immigration Law and Crimes*, Alabama State Bar, CLE, Jan. 13, 2009.

Alaska

Training: *Immigration Consequences of Criminal Convictions*, Alaska Public Defender Agency, 1999.

Training: *Immigration Consequences of Criminal Convictions*, Alaska Public Defender Agency, 2001.

Robin Bronen, *Immigration Consequences of Criminal Convictions*, 20.1 Alaska Justice Forum 4, Spring 2003.

Arizona

Tarik H. Sultan, *Immigration Consequences of Criminal Convictions: A Guideline for the Criminal Defense Attorney*, 30 Ariz. Att'y 15 (1994).

Training: *Criminal Immigration Issues in the Post 9-11 Era*, State Bar of Arizona, CLE, Nov. 30, 2005.

Training: *Representing Criminal Aliens*, State Bar of Arizona, CLE, Mar. 10, 2006.

Training: *Immigration Consequences of Your Client's Criminal Convictions*, Arizona Public Defenders Association, Annual Conference, June 2007. Also presented in Pima County, May 2007; Yuma County, Oct. 2007; and Maricopa County, Oct. 2007.

Kathy Brady *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2008).

Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008).

Training: *Immigration Consequences of Your Client's Criminal Convictions*, Arizona Public Defenders Office Annual Conference, June 2008. Also presented in Pima County, Jan. 17, 2008; Cochise County, Feb. 21, 2008; Yavapai County, Mar. 14, 2008; Navajo County, Apr., 15, 2008; Mohave County, June 12, 2008; and Phoenix, Oct. 2008.

### Arkansas

Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings & the Alien Defendant*, 50 Ark. L. Rev. 269 (1997).

California

Training: J. Gonzalez, *Representing Accused Non-Citizens*, California Attorneys for Criminal Justice (CACJ), Statewide Criminal Law Seminar Syllabus, May 6, 1978.

Federal Defenders of San Diego, Inc., *Defending A Federal Criminal Case* (1984).

Mark E. Roseman, *The Alien and the Guilty Plea: Caveat to the Defense*, 12 W. St. U. L. Rev. 155 (1984-1985).

Training: *Immigrant Rights in Transition, Handling Deportation Cases: Legal Training with Emphasis on Establishing Grounds for Suspension of Deportation*, Hispanic Children's Law Project and University of San Diego School of Law, San Diego, May 3-4, 1985.

Katherine A. Brady & David S. Schwartz, *Public Defenders Handbook On Immigration 1-4*, California Public Defenders Association (1988).

Josie Gonzalez, *Immigration Consequences of Criminal Convictions for "Amnesty" Applicants and Other Immigrants*, Jan. 1988 (Training materials prepared for the Los Angeles County Public Defender's Office).

Training: *Seminar of the Immigration Consequences of Criminal Convictions*, Immigrant Legal Resource Center (ILRC), San Francisco, Mar. 4, 1989.

Training: *Advanced Seminar on Motions to Suppress in Deportation Proceedings*, ILRC, San Francisco, June 22, 1989.

Training: *Seminar On the Immigration Consequences of Criminal Convictions*, San Diego chapter of AILA, San Diego, May 19, 1990.

Training: Norton Tooby, *Post-Conviction Relief and Its Impact on Immigration Cases*, ILRC and Golden Gate Law School, San Francisco, Sept. 18, 1990; San Jose, Sept. 25, 1990.

Jan Bejar, *Exclusion or Deportation based on Narcotics and Alien Smuggling Offenses*, Mar. 1990 (article written for federal and state defenders practicing in San Diego Area).

Katherine A. Brady, *et al.*, *California Criminal Law and Immigration*, ILRC (1990-present) (now entitled *Defending Immigrants in the Ninth Circuit*).

Training: Jan Bejar, *The 1990 Changes in Immigration Consequences for a Criminal Defendant*, Criminal Justice Act Seminar, San Diego, June 4, 1991.

Training: *Seminars on Representing Non-citizens With Criminal Records*, AILA California, NIPNLG, and the California Bar Association, San Diego, San Francisco, Sacramento, and Los Angeles, Sept.-Nov. 1991.

Training: *Immigration Consequences of Crimes*, ILRC, Davis, Sept. 1991; San Francisco, Sept. 1991; Los Angeles, Oct. 1991; and San Diego, Nov. 1991.

Katherine A. Brady, *New Developments in Representation of Non-Citizen Defendants*, 19 CACJ Forum, No. 2, at 30 (1992).

Training: Victor Castro, *Immigration Consequences of Criminal Convictions, Relief available to Noncitizens, and How to Strategize to Provide a Legal Defense*, Training to Santa Clara Criminal Bar, 1992.

Training: *Immigration Consequences of Criminal Convictions*, ILRC, Davis, March 1993; San Diego, March 1993; San Francisco, April 1993; Los Angeles, April 1993.

Jan Bejar, *Representing Aliens in Criminal Proceedings; Some Pitfalls for the Criminal Practitioner to Avoid*, CACJ (Apr. 1994).

Training: Gilbert Lopez, *Immigration Consequences of Criminal Convictions, Criminal Pleas, Diversion and Post-Conviction Remedies*, Los Angeles County Public Defender, Mar. 30, 1994.

Katherine A. Brady, Hon. Dana Marks Keener & Norton Tooby, Ch. 48, *Representing a Noncitizen Criminal Defendant in California Law Procedure and Practice* 1285 (Continuing Legal Education of the Bar of California, 3rd ed., 1994-present).

Training: *Immigration and Crimes*, ILRC, San Francisco, Feb. 1995.

Training: *Immigration Consequences of Crimes*, ILRC, San Francisco, April 1995; Los Angeles, May 1995; Fresno, May 1995; San Diego, June 1995.

Training: *Criminal Acts and Naturalization Law*, ILRC, San Jose, March 1997.

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May 1997; Fresno, May 1997; San Diego, June 1997.

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Training: *Criminal and Immigration Law*, ILRC, San Francisco, May 1998; Los Angeles, May 1998; San Francisco, Oct. 1998; Los Angeles, Oct. 1998.

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N. Tooby, *California Criminal Defense of Immigrants* (1999).

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Katherine A. Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select California Offenses* (2001-2010).



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Training: *Representing Non-citizen Criminal Defendants*, California Public Defenders Association, Jan. 27, 2007.

Training: *Immigration Consequences of Criminal Convictions and Crimes*, State Bar of California, CLE, March 24, 2008.

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Daniel M. Kowalski & Daniel C. Horne, *Defending the Noncitizen*, 24 Colo. Law 2177 (Specialty Law Column, 1995).

Cecelia M. Espenosa, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, 26 Colo. Law 89 (Oct. 1997).

Training: *Defending Noncitizens in Immigration Proceedings*, Colorado Bar Association, Oct. 24, 2002.

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Training: *Immigration Consequences of Criminal Convictions*, Colorado Criminal Defense Bar, Denver, Spring, 2006.

Jeff Joseph, *Immigration Consequences of Criminal Pleas and Convictions*, 35 Colo. Law 55 (Oct. 2006).

Training: *Immigration Consequences of Criminal Convictions*, Colorado Public Defender System, Fall, 2007.

Training: Hans Meyer, *Immigration Consequences of Criminal Pleas & Convictions*, Colorado Bar Association, CLE, March 26, 2008.

Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colorado State Public Defender, 2009).

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John J. Lacava, *Immigration Act of 1990 and its Effect on Criminal Aliens*, Mar. 12, 1991 (Immigration Law Bulletin included in Memorandum to All Attorneys of the Division of Public Defender Services of the State of Connecticut).

Training: *Immigration Consequences of Criminal Convictions*, Connecticut Criminal Defense Lawyers Association, April 2004.

Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2005-2010).

Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

Training: *Immigration 101: What Every Attorney Should Know*, New Haven County Bar Association, CLE, May 10, 2007.

Training: *Collateral Consequences of Arrest, Incarceration, & Conviction (Immigration Consequences)*, Connecticut Division of Public Defender Services, Hartford, Oct. 23, 2008.

### Delaware

Training: *Immigration Consequences of Criminal Convictions*, NIPNLG, Wilmington, Oct. 22, 1999.

### District of Columbia

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Training: *Immigration Consequences of Criminal Convictions*, Public Defender Service, Washington, June 11, 2002.

Training: David Cleveland, *Deportation and Removal*, DC Bar, CLE, May 19, 2003.

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Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Defender Service, 2008).

Florida

Training: *The Sixth Annual Immigration Law Update*, The Florida Bar Continuing Legal Education Committee, Miami, February 7-8, 1985.

Jeffrey N. Brauerman, *Criminal and Other Grounds for Deportation*, 61 Fla. B.J. 39 (June 1987).

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Training: Mary Kramer, Stuart Karden, Jeff Joseph & Hon. Denise N. Slavin, *Dealing with the Effects of Clients' Criminal Activity on their Immigration Status*, The Florida Bar, CLE, Feb. 8, 2008.

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Grace A. Sease & Socheat Chea, *The Consequences of Pleas in Immigration Law*, 6 Ga. B.J. 2 (Oct. 2000).

Training: *Immigration Consequences & Ethical & Professional Considerations*, Georgia Public Defender Standards Council, Oct. 17, 2005.

Christina Hendrix & Olivia Orza, *No Second Chances: Immigration Consequences of Criminal Charges*, 13 Ga. B.J. 4 (Dec. 2007).

Hawaii

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Idaho

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Mary L. Sfasciotti, *Representing Aliens in Criminal Cases – Recent Amendments to the Immigration and Naturalization Act*, 79 Ill. B.J. 78 (1991).

Maria Baldini-Potermine, *Defending Non-Citizens in Illinois Courts* (Midwest Imm. & Hum. Rts. Ctr., 2001).

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Training: *Immigration Consequences of Criminal Offenses*, Illinois State Bar Association, Chicago, CLE, May 1, 2009.

### Indiana

Training: *Immigration Consequences of Criminal Convictions*, Marion County Public Defender Agency, Marion County, May 22, 2002.

Training: Indiana Public Defender Council, *Immigration Consequences of Criminal Convictions*, 2007.

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### Iowa

Jim Benzoni, *Defending Aliens in Criminal Cases* (Training materials prepared for criminal defense lawyers attending CLE programs in Iowa from 1994-1997).

Training: *What Every Lawyer Should Know About Immigration Law, Immigration Consequences of Criminal Conduct*, University of Iowa College of Law, CLE, Sept. 30, 2006.



Trainings: *Immigration Consequences of Criminal Convictions*, Iowa State Public Defender (Biennial Seminars).

Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

### Kansas

Kathleen A. Harvey *et al.*, *Disaster on the Horizon: It's Post-'Conviction' Time; Do You Know Where Your Alien Client Is?*, 73 J. Kan. B.A. 16 (Feb. 2004).

### Kentucky

Training: *The Criminal Defendant & Immigration Law: What Every Public Defender Should Know Before Undertaking Representation of an Illegal Alien*, Kentucky Department of Public Advocacy (DPA), Lexington, June 12, 2001.

Training: *Collateral Consequences to Conviction*, Kentucky DPA, June 12, 2002.

Training: *Immigration and Criminal Law*, Kentucky DPA, Louisville, June 8, 2005.

Training: *Representing the Non-English Speaking Client*, Legislative Research Commission, Frankfort, June 29, 2005.

Training: *Immigration Consequences of Criminal Convictions*, National Network to End Violence Against Immigrant Women, Lexington, Nov. 4, 2005.

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Training: *Immigration Consequences of Crime*, Kentucky DPA, Erlanger, June 13, 2006.

Training: *Immigration Consequences of Crime*, Kentucky DPA, Louisville, June 20, 2007.

Training: *How to Work with Immigrants in the Criminal Justice System*, Kentucky DPA, Lexington, 2008.

Training: *Help! I Have Aliens in My Office! Immigration Law Basics for a General Practice*, Kentucky Bar Association, CLE, Covington, June 10, 2009.

### Louisiana

Training: *Immigration Law: Introductory and Advanced Topics*, New Orleans, Feb. 1985.

Training: Robert McWhirter, *The Rings of Immigration Hell: The Collateral Consequences of Criminal Conduct to Aliens*, Louisiana Association of Criminal Defense Lawyers, CLE, April 28, 2007.

### Maine

Training: *Immigration Traps for Unwary Lawyers*, Maine Bar Association, CLE, Sept. 20, 2007.

### Maryland

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Marvin J. Muller, III, *Only a Misdemeanor? For non-US citizens facing criminal charges, the stakes are often much higher*, Maryland State Bar Association Bar Bulletin, Immigration Law, Sept. 2004.

Rex B. Wingerter, *Consequences of Criminal Convictions*, 37 Md. B.J. 21 (Apr. 2004).

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Training: Maryland Office of the Public Defender *et al.*, *What Every Maryland Criminal Defense Attorney Should Know About Immigration*, Sept. 19-Oct. 24, 2007.

*Immigration Pitfalls in Family and Criminal Cases*, Maryland State Bar Association, 9th Annual Solo and Small Firm Conference, Nov. 3, 2007.

Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Non-citizens*, 41 Md. B.J. 40 (2008).

Training: *Immigration Consequences of Criminal Activity*, Maryland Institute for Continuing Professional Education of Lawyers, CLE, Oct. 24, 2008.

Massachusetts

Lisa Freije, *Judicial Recommendation Against Deportation*, Committee for Public Counsel Services (CPCS) JRAD Discussion, July 1985 (distributed to CPCS staff attorneys and used at subsequent trainings).

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Daniel Kanstroom, *Immigration Consequences of Criminal Offenses in Massachusetts Criminal Defense* 106-115 (Eric Blumenson & Stanley Z. Fisher ed., Butterworth Legal Publishers, 1992) (updated by Laura Murray Tjan, 2008).

Joseph A. Sexton, III, *Defending Non-Citizens in Criminal Cases*, *Immigration Consequences of Criminal Cases*, 1995 (distributed in Middlesex County).

Training: Daniel Kanstroom, *Immigration Consequences of Criminal Offenses*, Dorchester Bar Association, Mar. 8, 1995.

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Training: *Immigration Consequences of Criminal Convictions*, Essex County Defenders, Essex County, Oct. 1, 2005.

Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (NIPNLG, 2006).

Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Training: *Immigration Consequences of Criminal Conduct: Overview of Concepts & Discussion of Emerging Issues*, Massachusetts Bar Association, CLE, Feb. 12, 2009.

Debbie Wald, *Immigration Consequences of Criminal Convictions*, CPCS Memorandum (distributed to CPCS staff attorneys in Boston and Cambridge).

### Michigan

Mardi Crawford, *Immigration Consequences of Criminal Prosecution*, Michigan State Appellate Defender Office Criminal Defense Newsletter, Vol. 8 No. 2, Nov. 1984.

Ronald Kaplovitz, *Criminal Immigration - The Consequences of Criminal Convictions on Non-U.S. Citizens*, 82 Mich. B.J. 30 (2003).

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Randy E. Davidson, *Resources on Collateral Consequences of Criminal Convictions*, 87 Mich. B.J. 52 (2008).

Training: *Immigration Consequences of Criminal Convictions*, Criminal Defense Attorneys of Michigan, Spring & Fall 2008.

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### Minnesota

Maria Baldini-Potermine, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Training: *Immigration and Criminal Defense Strategies: How to Keep Your Client from Being Deported (What Every Immigration Lawyer Needs to Know About Criminal Cases & "Visa" Versa)*, Minnesota State Bar Association, Dec. 14, 2006 and Nov. 14, 2008.

Dinesh Shenoy & Salima Oines Khakoo, *One Strike & You're Out! The Crumbling Distinction Between the Criminal & the Civil for Immigrants in the Twenty-First Century*, 35 Wm. Mitchell L. Rev. 135 (2008).



Missouri

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Montana

Training: *The Basics of Immigration Law for Criminal Defense Lawyers*, Federal Defenders of Montana and Montana Association of Criminal Defense Lawyers, CLE, Aug. 10, 2007.

Nebraska

Vard Johnson, *Duty To Advise Non-United States Citizen Clients of Adverse Immigration Consequences Resulting From A Plea And Conviction: Strategies For Minimizing Adverse Consequences*, Habeas Corpus, Nebraska Criminal Defense Attorneys Association (July/Aug. 2002).

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Training: Michael Franquinha, *The Immigration Consequences of Criminal Convictions*, Nebraska State Bar Association, CLE, Mar. 19, 2004.

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Steve Brazelton, *Immigration Pitfalls of the Plea Bargain: Criminal Attorneys Beware*, 7 Nev. L. 13 (Nov. 1999).

Training: *Immigration Consequences of Criminal Convictions*, Washoe County Public Defender's Office, Reno, NV, 2007.

### New Hampshire

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### New Jersey

Training: *Immigration Law and Procedure*, The New Jersey Chapter of the Federal Bar Association, Newark, 1984.

Training: *Immigration Law And Procedure, Convictions and the Alien: Recommendations Against Deportation*, The New Jersey Chapter of the Federal Bar Association, Newark, June 19, 1985.

Robert Frank, *Criminal Defense of Foreign Nationals*, 167 N.J. Law 36 (1995).

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Robert Frank, *Immigration Consequences of Criminal Acts*, 232 N.J. Law 29 (Feb. 2005).

Training: *Immigration Consequences of New Jersey and Federal Criminal Convictions*, Trenton, June 7, 2008.

Training: *Immigration Consequences of N.J. Criminal Dispositions*, New Jersey Office of the Public Defender, Trenton, Jan. 29, 2008.

### New Mexico

Tova Indritz, *Representing a Non-Citizen in a Criminal Case*, N.M. B.J. 11 (Nov./Dec. 1995).

Tova Indritz, *Representing an Alien in a Criminal Case: Obtaining the Sentencing Court's Recommendation Against Deportation*, XVI The New Mexico Trial Lawyer 1, 1988.

Training: *Immigration Consequences of Criminal Convictions*, New Mexico Criminal Defense Lawyers, Las Cruces, Sept. 13, 2002.

Training: *Immigration Consequences of Criminal Convictions*, New Mexico State Public Defender Seminar, Oct. 2003.

Jacqueline Cooper, *NMCDLA Laminated Guide: Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005).

Training: *Immigration Consequences: How to Keep a Minor Conviction from Triggering Lifelong Banishment to a Foreign Country*, New Mexico Criminal Defense Lawyers, June 13, 2008.

#### New York

Training: *Immigration Law and Procedure*, Brooklyn Bar Association, Brooklyn, May 1984.

Training: *Immigration Law for the General and Advanced Practitioner*, New York State Bar Association, New York, May 1984.

Training: *The Propriety of Detaining Refugees in the United States*, The Association of the Bar of the City of New York, New York, April 23, 1985.

Margaret McManus, *Immigration Consequences of Criminal Conduct*, Sept. 1985 (training materials prepared for Criminal Defense Division of the Legal Aid Society of New York).

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Training: Linda Kenepaske, *The Intersection of Criminal & Immigration Law – What You Don't Know May Hurt Your Client*, New York City Bar Association, CLE, Feb. 18, 2009.

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Carmen Maria Rey, *Immigration Consequences of Criminal Behavior*, The New York Immigration Coalition, Immigrant Concerns Training Institute, June 16, 2009.

#### North Carolina

Training: Fourth Annual Immigration Law Seminar, *Deportation Defense, an Update*, Carolinas Chapter of AILA, Charlotte, Nov. 22-25, 1985.

Training: *Immigration Consequences of Criminal Convictions*, North Carolina Bar Association, CLE, Sept. 1, 2001.

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Jonathan David Guze & Hans Christian Linnartz, *Immigration and Nationality Law*, North Carolina General Practice Deskbook, Vol. 1 (3d ed., 2004).

Training: Kaci Bishop, *Immigration Consequences of Criminal Offenses: Terms and Resources*, Spring 2006 Public Defender Conference.



Training: Sejal Zota, *Immigration Consequences of Drug Offenses*, Fall 2007 Public Defender Seminar.

Training: *Advising Non-citizen Defendants of the Immigration Consequences of Crime*, Mecklenburg County Public Defenders, Charlotte, Oct. 25, 2007.

Training: Jeremy L. McKinney, *Avoiding Immigration Consequences in Criminal Court*, North Carolina Bar Association 2007 Criminal Justice Section Annual Meeting, CLE, Nov. 16, 2007.

Training: Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina*, Office of Indigent Defense Services, 2008.

#### North Dakota

Training: *Immigration Consequences of Criminal Activity*, Minnesota Legal Services Coalition (approved for CLE credit in North Dakota), Nov. 3, 2006.

Training: *Immigration Consequences of Crimes*, NIPNLG, Grand Forks, Mar. 2, 2007.

#### Ohio

Melinda Smith, *Criminal Defense Attorneys and Non-Citizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in those Laws May Affect Your Criminal Cases*, 33 Akron L. Rev. 163 (1999).

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Karen D. Bradley, *Ten Things a Criminal Defense Attorney Should Know When Representing the Non-Citizen in Criminal Proceedings*, 34 U. Dayton L. Rev. 35 (2008).

Training: *Immigration Consequences of Criminal Convictions & Removal (Deportation) & Inadmissibility*, Ohio Bar Association, CLE, Mar. 17, 2009.

### Oklahoma

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Oregon

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Training: Steve Manning, *Immigration Consequences of Common Criminal Prosecutions*, Oregon Chapter of AILA, 2009.

Pennsylvania

Training: *Immigration Law and Practice*, Philadelphia Chapter of AILA & The Committee on Professional Education of the Philadelphia Bar Association, Philadelphia, Apr. 25, 1985.

Training: Steven Morley, *The Immigration Consequences of Criminal Activity*, Pennsylvania Bar Institute, CLE, Dec. 8, 2005.

Training: Jay Bagia & Shelley L. Grant, *Dealing with Common Immigration Problems in Criminal Cases*, Pennsylvania Bar Institute, CLE, June 8, 2007.

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Rhode Island

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Training: Amanda B. Keaveny, *Immigration Consequences of Criminal Convictions*, South Carolina Bar, CLE, July 25, 2008.

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**AMICUS  
CURIAE  
BRIEF**

No. 11-820

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**In the Supreme Court of the United States**

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ROSELVA CHAIDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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BRIEF FOR NEW JERSEY, ALABAMA, ALASKA, ARIZONA,  
COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO,  
INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND,  
MICHIGAN, MISSOURI, NEBRASKA, NEW HAMPSHIRE,  
NEW MEXICO, OKLAHOMA, PENNSYLVANIA, SOUTH  
DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON,  
WISCONSIN & WYOMING AS *AMICI CURIAE* IN  
SUPPORT OF THE UNITED STATES OF AMERICA

---

JEFFREY S. CHIESA

*Attorney General of New Jersey*

FRANK MUROSKI

*Deputy Attorney General*

*Counsel of Record*

muroskif@njdcj.org

Division of Criminal Justice

Hughes Justice Complex

P.O. Box 086

Trenton, New Jersey 08625

(609) 292-9086

*Counsel for Amici Curiae*

[Additional counsel listed on inside cover]

---



Luther Strange, Attorney General of Alabama  
Michael C. Geraghty, Attorney General of Alaska  
Tom Horne, Attorney General of Arizona  
John W. Suthers, Attorney General of Colorado  
Joseph R. Biden, III, Attorney General of Delaware  
Samuel S. Olens, Attorney General of Georgia  
David M. Louie, Attorney General of Hawaii  
Lawrence G. Wasden, Attorney General of Idaho  
Gregory F. Zoeller, Attorney General of Indiana  
Derek Schmidt, Attorney General of Kansas  
Jack Conway, Attorney General of Kentucky  
William J. Schneider, Attorney General of Maine  
Douglas F. Gansler, Attorney General of Maryland  
Bill Schuette, Attorney General of Michigan  
Chris Koster, Attorney General of Missouri  
Jon Bruning, Attorney General of Nebraska  
Michael A. Delaney, Attorney General of New Hampshire  
Gary K. King, Attorney General of New Mexico  
E. Scott Pruitt, Attorney General of Oklahoma  
Linda L. Kelly, Attorney General of Pennsylvania  
Marty J. Jackley, Attorney General of South Dakota  
Robert E. Cooper, Jr., Attorney General of Tennessee  
Mark L. Shurtleff, Attorney General of Utah  
Kenneth T. Cuccinelli, II, Attorney General of Virginia  
Robert M. McKenna, Attorney General of Washington  
J. B. Van Hollen, Attorney General of Wisconsin  
Gregory A. Phillips, Attorney General of Wyoming

## QUESTION PRESENTED

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), this Court established the following rule: "When the deportation consequence is truly clear," the attorney has a Sixth Amendment duty "to give correct advice[.]" "When the law is not succinct and straightforward," the attorney need only warn "that pending criminal charges may carry a risk of adverse immigration consequences."

The question here is whether this rule is new as defined by *Teague v. Lane*, 489 U.S. 288 (1989), or whether it was dictated by *Strickland v. Washington*, 466 U.S. 668 (1984), and must be applied retroactively to all cases on collateral review.

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## STATEMENT OF AMICI INTEREST

Amici States have an interest in this case because if *Padilla* is applied retroactively to cases on collateral review, thousands of convicted aliens will seek to withdraw their guilty pleas. In each case, hearings will be necessary to determine whether counsel properly informed his or her client of the immigration consequences of pleading guilty. If the outcome is that the plea was mis- or uninformed, the Amici States will have two unpalatable choices. One is to bear the burden of conducting trials, made far more difficult by the passage of time. And if witnesses or evidence are no longer available, the State may be forced to dismiss the case, allowing the already-admitted criminal to avoid what remains of his or her sentence, a criminal record, and the grounds for removal.

## SUMMARY OF ARGUMENT

The Court of Appeals correctly found that *Padilla* announced a new rule according to the *Teague* retroactivity test and should not be applied to cases on collateral review. This new *Padilla* rule requiring "correct advice" when the deportation consequence is "truly clear," and a warning when "the law is not succinct and straightforward," necessarily requires attorneys and courts reviewing ineffectiveness claims to make the threshold determination whether the law was "truly clear."

A rule is "new" under *Teague* if it was not dictated by precedent, if it broke new ground, or if it imposed a new obligation on the States or the Federal

Government. The *Padilla* rule was certainly not dictated by precedent. Advice regarding immigration was consistently considered for decades by virtually every jurist that considered the issue to be a collateral consequence and thus not required under the *Strickland* test for determining ineffective assistance of counsel under the Sixth Amendment.

The collateral-consequences rule was anchored to this Court's ruling in *Brady v. United States*, 397 U.S. 742 (1970), which required under the Fifth Amendment that a defendant pleading guilty need only be aware of the direct consequences of his plea. Deportation was long considered a civil collateral consequence because it did not directly result from a conviction. An institution other than a criminal court was responsible for determining whether and when to begin the removal process, which was not subject to the Constitution's criminal safeguards, including the Sixth Amendment right to counsel. Although removal may have become harder to stop once such proceedings are instituted under the 1996 amendments to the law, federal immigration authorities have maintained an unreviewable discretion to not seek removal in the first instance. Almost every jurist drew the reasonable conclusion that the collateral-consequences rule made sense under the Sixth Amendment as well. This nationwide rule had coexisted with *Strickland* for decades despite the many challenges to undo it.

To the extent "prevailing norms of practice" can influence whether a rule is retroactive under *Teague*, the American Bar Association (ABA) Standards do not even mention deportation, let alone dictate that it be singled out for unique treatment in determining whether counsel was effective under the Sixth

Amendment. In fact, the commentary to the Standards actually indicated that the ABA Standard was more demanding than the Sixth Amendment.

This Court broke new ground in *Padilla* by the brand new attention it paid to collateral deportation consequences in the Sixth Amendment context and especially in its unprecedented conclusion that deportation was difficult to classify as either a direct or collateral consequence. Virtually all of the many jurists who had applied existing precedent to this issue over the preceding decades had little difficulty in classifying deportation as a collateral consequence. Particularly groundbreaking was *Padilla's* innovative two-tiered approach in determining when correct advice should be given as opposed to a warning. No other court had previously found such a particular test to be necessary. The notion that immigration consequences are ever truly clear remains debatable.

This novel rule also imposed significant new obligations on the states. For the first time, state public defenders are required to learn federal statutory law and sufficiently enough to advise their clients about it. This is particularly difficult when the federal statutory scheme imposed on them is civil deportation law, considered a legal specialty of its own. And state criminal judges now must become at least as knowledgeable about deportation law in order to determine whether the law was truly clear and whether the attorney gave correct advice. This Court recently held in *Arizona v. United States*, 132 S. Ct. 2492 (2012), that the process of removing unlawfully present aliens is entrusted to the federal government, not the states. And even those states that have taken measures to reinforce the prohibition on illegal immigration defer to



the federal government's determinations as to whether a particular person is lawfully present in the country. So when *Padilla* held that state governments must determine for themselves whether a particular court action would lead to deportation by the federal government, it established an obligation that was in the very least new.

This imposition on state criminal-justice resources to ensure that aliens are properly advised about federal immigration consequences prior to admitting their guilt for their state crimes is an unprecedented and entirely new obligation. As such, it should not be applied retroactively because it is doubtful that most attorneys pre-*Padilla* applied anything resembling this new two-tiered test in determining how to advise their clients before pleading guilty. This would lead to a flood of collateral litigation as to what their attorneys told them, often many years after they admitted their guilt. This would undermine the states' interest in the finality of their convictions to the detriment of public safety.

Since the *Padilla* rule was not dictated by precedent, broke new ground and imposed new obligations on the states, it must be considered a new rule for retroactivity purposes and not applied to cases on collateral review.

## ARGUMENT

*Padilla v. Kentucky* established a new rule that should not be applied retroactively to cases on collateral review.

*Padilla v. Kentucky* established a two-tiered rule:

"When the deportation consequence is truly clear," the attorney is required "to give correct advice"; "[w]hen the law is not succinct and straightforward," the attorney need only warn "that pending criminal charges may carry a risk of adverse immigration consequences." 130 S. Ct. at 1483. Implicit in this standard is the threshold necessity, for both defense attorneys and judges evaluating ineffectiveness claims, to determine whether the immigration consequences are truly clear, in order to determine whether correct advice or merely a warning is required. Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), these rules apply to all cases not yet final on direct appeal when *Padilla* was announced. At issue here is whether these rules also apply to cases that were already final, some for years or decades.

*Teague v. Lane*, 489 U.S. 288 (1989) provides the test for assessing whether a rule of criminal procedure announced by this Court applies retroactively. Under *Teague*, with one exception not applicable here, a *new* rule of criminal procedure is not applied retroactively to cases on collateral review.<sup>1</sup> This Court defines "a new rule as a rule that 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated*' by precedent existing at the time the defendant's conviction became final." *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Teague*, 489 U.S. at 301).

This "new rule" principle "validates reasonable, good-faith interpretations of existing precedents . . .

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<sup>1</sup> The exception is if the new rule is a "watershed" rule akin to the right to counsel established in *Gideon v. Wainwright*, 327 U.S. 335 (1963). Not even petitioner suggests that *Padilla* falls within that exception.

even though they are shown to be contrary to later decisions.” *Butler v. McKellar*, 494 U.S. 407, 414 (1990). In determining whether a rule is new, a court “must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule.” *Beard v. Banks*, 542 U.S. 406, 411 (2004) (internal quotation marks and citations omitted). That compelling legal landscape must have been “apparent to all reasonable jurists.” *Id.*, (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–528 (1997)).

A forceful argument that a holding was based on a reasonable interpretation of prior law, and was perhaps even the most reasonable, is not enough for it to be retroactive. A rule is retroactive only where “*no other* interpretation was reasonable.” *Lambrix*, 520 U.S. at 538. This standard requires jurists to have ruled with “reasonableness,” not “prescience,” as to the rule this Court would eventually develop and require. See *id.*, at 536 n.5. So long as it “would not have been an illogical or even a grudging application” of precedent to decide to the contrary, it must be considered a new rule for retroactivity purposes. *Butler*, 494 U.S. at 415.

As demonstrated below, *Padilla* does not apply retroactively to cases on collateral review because it was not dictated by precedent or practice, it unquestionably broke new ground, and it imposes significant new obligations on the States.

#### A. *Padilla* was not dictated by precedent.

To be considered dictated by precedent, the principle derived from precedent must more than simply support the rule when “conceived of at a high

level of generality.” *Banks*, 542 U.S. at 416. Although *Strickland* may have supported *Padilla* at a high level of generality, it did not dictate the result. See U.S. Br. 31–35. And when reasonable jurists have disagreed over whether the prior case conceived of at a high level of generality even supports the rule, it follows *a fortiori* that reasonable jurists could have concluded that the prior case did not compel the rule. See *ibid*.

1. In surveying the legal landscape, this Court will look to its own precedents first. None of those precedents dictated the outcome of *Padilla*, let alone the specific rules it established. *Padilla* itself made clear that the rule it announced was not dictated by *Hill v. Lockhart*, 474 U.S. 52 (1985), stating that “*Hill* does not control the question before us.” 109 S. Ct. at 1485 n.12. Yet it was not until *Hill* was decided that *Strickland* was extended to apply to guilty pleas. *Hill* would have logically been the closest case to even remotely require the *Padilla* rule. But this Court expressly disclaimed that its holding was dictated by *Hill*, thus leaving *Strickland* alone with the difficult task of dictating the specific rule in *Padilla*.

It was more than reasonable for jurists to view *Strickland* as limited to criminal *trial* matters. *Strickland* is replete with references to the criminal-trial context, with no indication—let alone a clear indication—that it applied to the indirect consequences of plea bargaining. For example, *Strickland* began by framing the issue in the context of when “counsel’s assistance at trial or sentencing was ineffective.” 466 U.S. at 671. When discussing the Sixth Amendment right to counsel, this Court said it was “needed, in order to protect the fundamental right to a fair trial.” *Id.*, at 684.

*Strickland* applied its test to a capital-sentencing proceeding because it was "sufficiently like a trial in its adversarial format," where "counsel's role . . . is comparable to counsel's role at trial." *Id.*, at 686–687. Nothing in *Strickland* when issued dictated that counsel had any Sixth Amendment duty during plea-bargaining to advise about deportation consequences. *Strickland* could not possibly have "dictated" the rule in *Padilla* if the rule that extended *Strickland* to the guilty-plea context for the first time, *Hill*, did not dictate that rule.

2. Nor had this Court's precedents ever cast doubt on the well-known collateral-consequences rule. The rule had long been anchored to *Brady*, where this Court held that a guilty plea is valid under the Fifth Amendment if "entered by one fully aware of the *direct* consequences." 397 U.S. at 755 (citation omitted) (emphasis added). The court below cited *Brady* and correctly noted that "the distinction between direct and collateral consequences was not without foundation in Supreme Court precedent." Pet. App. 13a.

Federal and State courts had long adhered to *Brady* by distinguishing between direct consequences of a conviction, about which counsel must advise the defendant, and collateral consequences, about which counsel does not have to advise the defendant. See Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 704–710 (2002) (collecting cases). Even more specifically, courts had long relied on *Brady* in accepting that deportation, despite its severity, is not a direct consequence of a criminal conviction, nor is it so unique among collateral consequences that an attorney had to discuss it under



*Strickland*. See, e.g., *United States v. Del Rosario*, 902 F.2d 55, 58–59 (D.C. Cir.), *cert. denied*, 498 U.S. 942 (1990).

Deportation was considered collateral because the benefits from advice regarding immigration consequences are not realized in a criminal prosecution but only in a civil removal proceeding, which is instituted after the sentence for the crime is served and only upon the discretionary action of federal immigration officials who have been entrusted with an unreviewable enforcement discretion not to commence removal proceedings in the first instance. This enforcement discretion was actually enhanced by 8 U.S.C. § 1252(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477–486, n.8 (1999) (finding “no indication that the INS has ceased making this sort of determination on a case-by-case basis” to avoid an unjust outcome).

Because criminal judges are powerless even to institute removal proceedings and only federal immigration officials had the discretionary power to do so, the consequence of removal was reasonably considered to not be the direct result of the criminal prosecution but a civil collateral consequence, regardless of its perceived certainty. See *United States v. Amador-Leal*, 276 F.3d 511, 516–517 (9th Cir.) (finding despite IIRIRA and Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, removal is collateral because process is separate and distinct from criminal proceeding), *cert. denied*, 535 U.S. 1070 (2002).

Further confirmation is this Court’s approving



citation to *United States v. Gavilan*, 761 F.2d 226 (5th Cir. 1985) in *Hill*. See 474 U.S. at 59. In *Gavilan*, the Fifth Circuit expressly recognized that despite the severity of deportation, it was an indirect collateral consequence, of which a defendant's misunderstanding "has been repeatedly viewed as insufficient to render a guilty plea involuntary[,]" and expressly applied this distinction in finding the *Strickland* test unmet. 761 F.2d at 228–229. *Gavilan* relied on *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982), which in turn relied on *Brady*. Although *Hill* did not address deportation in particular, it approved of *Gavilan*'s "general approach" in applying *Strickland* to the guilty-plea context.

As a federal court of appeals stated as far back as 1976, "[t]he distinction between direct and collateral consequences is familiar to us." *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir.) (finding deportation not a direct consequence but rather a collateral consequence that defendant need not be informed of before pleading guilty), *cert. denied*, 429 U.S. 895 (1976). *Fruchtman* relied on the oft-cited case *United States v. Parrino*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954), which held that despite "the terrific impact on the defendant's life," deportability is a collateral consequence determined by civil-immigration law, and courts "may not properly let sympathy, thus engendered, by intrusion into the field of criminal administration disturb the finality of criminal process and thus undermine effective law enforcement." *Id.*, at 922. The Ninth Circuit reaffirmed *Fruchtman* even after AEDPA and IIRIRA. See *Amador-Leal*, 276 F.3d at 516–517. Accord *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir.), *cert. denied*, 537 U.S. 1024

(2002). The court below correctly found that this rule remained the consensus until *Padilla*. See Pet. App. 10a–12a.

This distinction between direct and collateral consequences, including deportation, reasonably found support in this Court’s caselaw, especially *Brady*, and other well-known federal cases. This distinction was widely accepted throughout the judiciary, where virtually every court in the land relied on it. A jurist would have been reasonable to believe that after so many years of the oft-invoked rule’s coexistence with *Strickland*, that *Strickland* did not dictate to the contrary.

3. Another line of precedent for not applying the Sixth Amendment to deportation advice are this Court’s decisions refusing to extend the Constitution’s criminal safeguards to the deportation context. This Court had held that since a deportation determination is “a purely civil action[,]” “various protections that apply in the context of a criminal trial do not apply in a deportation hearing.” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). *Lopez-Mendoza* reaffirmed an earlier observation made on behalf of this Court by Justice Frankfurter: “According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions.” *Abel v. United States*, 362 U.S. 217, 237 (1960). And this part of *Lopez-Mendoza*, rejecting “the argument that deportation is punishment for past behavior and . . . therefore subject to the ‘various protections that apply in . . . a criminal trial[,]’” was reiterated in *INS v. St. Cyr*, 533 U.S. 289, 324 (2001) (quoting *Lopez-Mendoza*, 468 U.S. at 1038), well after AEDPA and IIRIRA, the amendments to the immigration statutes

found significant in *Padilla*. 130 S. Ct. at 1480.

Consistent with *Lopez-Mendoza*, courts had reasonably concluded that immigration consequences were relevant only to a “deportation proceeding,” which “is a civil proceeding which may result from a criminal prosecution, but is not part of or enmeshed in the criminal proceeding[, and therefore] is collateral to the criminal prosecution.” *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989). “While the Sixth Amendment assures an accused of effective assistance of counsel in ‘*criminal prosecutions*,’ this assurance does not extend to collateral aspects of the prosecution.” *Ibid.* Accord *State v. Zarate*, 651 N.W.2d 215, 222–223 (Neb. 2002) (citing *George*). See also *Amador-Leal*, 276 F.3d at 516–517 (citing *Lopez-Mendoza* in reaffirming collateral-consequences rule).

Indeed, the Sixth Amendment itself reads, “In all *criminal prosecutions*, the accused shall enjoy the right to . . . have the Assistance of Counsel for his *defence*.” U.S. Const. Amend. VI (emphasis added). And four current members of this Court have agreed that “‘defence’ means defense at trial, not defense in relation to other objectives that may be important to the accused.” *Padilla*, 130 S. Ct. at 1495 (Scalia, J., joined by Thomas, J., dissenting) (quoting *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., joined by Roberts, C.J., and Scalia, J., concurring)). In fact, the Sixth Amendment has never required government-paid counsel in the actual deportation proceeding. See 8 U.S.C. § 1229a(b)(4)(A) (providing alien with “privilege” of being represented by counsel of choice during removal proceedings “at no expense to the government”); *Georcely v. Ashcroft*, 375 F.3d 45, 50 (1st Cir. 2004) (noting Sixth Amendment does not apply to

civil-deportation proceedings).

This Court's clear demarcation between the Constitution's applicability to criminal prosecutions, as opposed to immigration determinations, served as precedent for the reasonable belief that advice on potential deportation consequences was likewise outside the ambit of the Sixth Amendment right to the effective assistance of criminal counsel.

4. Further evidence that a rule was not dictated by precedent are the contrary views of the dissenting and concurring justices in the decision adopting the rule. See *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997). In *Padilla*, four justices strongly disagreed with the majority's new two-tiered test that required attorneys to give "correct" advice when the consequences are "truly clear" and a warning only when the law is "not succinct and straightforward." The two-justice concurrence, along with the two-justice dissent, sharply disagreed with what it called the majority's "dramatic departure from precedent" which held that specific immigration-law advice should be required when the statute is deemed "truly clear." 130 S. Ct. at 1487-1488 (Alito, J., joined by Roberts, C.J., concurring in the judgment); *id.*, at 1494 (Scalia, J., joined by Thomas, J., dissenting) (joining Part I of concurrence).

The concurrence found the majority's "new approach" "particularly problematic" largely because determining what is truly clear is itself "often quite complex." *Id.*, at 1488. Justice Alito declared that the ruling "marks a major upheaval in Sixth Amendment law" and is a "dramatic expansion of the scope of the criminal defense counsel's duties under the Sixth Amendment." *Id.*, at 1491-1492. The concurrence concluded that the Court's precedent extending

*Strickland* to plea bargaining “plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to [the] collateral consequence [of] removal[].” *Id.*, at 1492.

5. Under *Teague*, after looking at its own precedent, this Court will survey the lower courts’ interpretations to see whether jurists could have reasonably disagreed. See *Lambrix*, 520 U.S. at 538 (relying on lower federal and state cases to show a reasonable conclusion contrary to Court’s subsequent holding). A new rule is thus announced when the interpretation of precedent was “susceptible to debate among reasonable minds.” *O’Dell*, 521 U.S. at 160 (quoting *Butler*, 494 U.S. at 415). Such debate exists when there is “a significant difference of opinion among the lower courts that had considered the question previously.” *Butler*, 494 U.S. at 415. Actually, on this issue, there was little debate. “Such rare unanimity among the lower courts is compelling evidence that reasonable jurists . . . could have disagreed about the outcome of *Padilla*.” Pet. App. 10a. As the United States’ brief shows, virtually all of the many courts that addressed the issue pre-*Padilla* held that *Strickland* did not require defense counsel to advise their clients on the immigration consequences of pleading guilty. U.S. Br. 13–17.

Indeed, even prominent proponents of the *Padilla* rule admitted that it was not dictated by precedent. *Padilla* relied on a law-review article among the “weight of prevailing professional norms” to support its new rule. See 130 S. Ct. at 294 (citing Chin & Holmes, 87 Cornell L. Rev. at 713–718). The article repeatedly acknowledged that the rule “that defense lawyers’ constitutional duty to advise clients” is limited to “the



direct consequences of a guilty plea” is “one of the most widely accepted principles of American criminal procedure,” 87 Cornell L. Rev. at 699, and “among the most widely recognized rules of American law.” *Id.*, at 706.

Chin and Holmes admitted that it was “accurate to say that no jurisdiction has rejected the general principle that counsel need not consider collateral consequences in advising clients about guilty pleas.” *Id.*, at 709. And they identified deportation as one such collateral consequence. *Id.*, at 700. The article conveyed that “eleven federal circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences,” while “no court rejects the rule.” *Id.*, at 699. The authors noted that “[t]he collateral consequences rule is remarkable because it has apparently been embraced by every jurisdiction that has considered it.” *Id.*, at 723. They referred to this body of caselaw as a “wall of precedent.” *Id.*, at 701.

Chin and Holmes urged adoption of a new rule for collateral consequences, but they expressly did so “[f]rom the perspective of setting standards for cases to come rather than cases already disposed of[.]” *Ibid.* This “wall of precedent” acknowledged by Chin and Holmes shows *Padilla* was not dictated by precedent. For a rule to be so considered, the legal landscape must “compel” the result, not merely “support” it. See *Beard v. Banks*, 542 U.S. 406 (2004). Despite the support derived from *Strickland* by *Padilla*, virtually no jurists had felt compelled by it. The Seventh Circuit thus correctly found that *Padilla*’s two-tiered test was a “nuanced, new analysis [that] cannot be characterized as having been dictated by precedent.” Pet. App. 17a.



**B. *Padilla* was not dictated by prevailing norms of practice.**

Petitioners' amici rely heavily on the supposed weight of "prevailing norms of practice." See NACDL Br. 6–11; AILA Br. 9. Even assuming such prevailing norms are relevant to the *Teague* inquiry, they do not support retroactivity. The only source of "prevailing norms" identified in *Strickland* itself are the ABA Standards. 466 U.S. at 688. These were the only codified standards that jurists were expressly instructed to consider when determining the reasonableness of attorney conduct under *Strickland*. The ABA Standards do not support petitioner's position for two reasons: first, as *Padilla* itself recognized, even the ABA Standards are "only guides," not "inexorable commands," see 130 S. Ct. at 1482; second, those Standards did not specify that defense counsel must advise their clients regarding deportation, especially to validate a guilty plea.

1. This Court had already found one of standards in the ABA Defense Function Standards, one of the categories referenced in *Padilla*, does not establish a Sixth Amendment duty. Specifically, in *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000), the Court observed that the ABA Standards for Criminal Justice, Defense Function 4-8.2(a) (3d. ed. 1993) (ABA Defense Function Standards), states that counsel should consult with the defendant regarding a possible appeal. The Court further agreed that providing such consultation might represent the "better practice." The Court nonetheless refused to hold, "as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable

and therefore deficient.” *Ibid.* This Court so found because “the purpose of the effective assistance guarantee of the *Sixth Amendment* is not to improve the quality of legal representation . . . [but rather] simply to ensure that criminal defendants receive a fair trial.” *Id.*, at 481 (quoting *Strickland*, 466 U.S. at 689).

Likewise, this Court has held that simply because the ABA Standard might “be thought to be the ‘better’ view does not mean that it is incorporated into the *Fourteenth Amendment*.” *Mu’Min v. Virginia*, 500 U.S. 415, 430–431 (1991) (rejecting ABA Standard for juror eligibility as stricter than what Constitution required). This Court also noted that the particular ABA Standard in that case had not commended itself to a majority of state and federal courts that had considered the issue. *Id.*, at 431. To the extent the ABA Standards encouraged defense counsel to provide advice on deportation consequences (but see point 2 below), that guidance commended itself to an even smaller percentage of the many courts that considered the collateral consequences rule.

2. The beginning of the ABA Defense Function Standards makes clear, “These standards . . . are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a guilty plea.” ABA Defense Function Standards 4-1.1. And the related commentary clarifies that “these Standards are not intended to create substantive or procedural rights which might accrue either to the accused or [to] convicted persons[.]” *Id.*, cmt. at 120.

Moreover, the two ABA Standards referenced in *Padilla* do not even mention deportation, and certainly do not say deportation is “unique” among collateral

consequences as requiring a special two-tiered rule in order to satisfy the Sixth Amendment. The first of these standards is ABA Defense Function Standard 4-5.1(a), which provided:

After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

The second of these standards is ABA Standards for Criminal Justice, Pleas of Guilty, 14-3.2(f) (3d ed. 1999), which provided:

To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Undoubtedly, these all-encompassing references to "all aspects of the case" and "possible collateral consequences" include deportation as an aspirational ethical ideal. But if they clearly dictated a Sixth Amendment right to advice about deportation, they equally dictated a Sixth Amendment right to advice about every other collateral consequence of pleading guilty, from the loss of the right to vote to the loss of the right to purchase a gun to professional disbarment. Yet no one can seriously contend that the Sixth Amendment, especially as presently interpreted by

*Strickland*, dictates that defense counsel advise defendants about *all* collateral consequences.

In short, the ABA Standards' general references did not dictate that the Sixth Amendment as interpreted by *Strickland* required deportation be singled out for special attention. Deportation is mentioned only in the unofficial commentary to Standard 14-3.2(f). It is not mentioned in the Standards themselves, nor even in the commentary to Standard 4-5.1(a). The difference between the unofficial commentary and the black-letter Standards is no petty distinction. Relying on the unofficial commentary to establish a retroactive Sixth Amendment duty is problematic for at least three reasons.

First, the ABA itself issued an express disclaimer making clear that the accompanying commentary was not its official position. On the first pages after the title pages of the ABA Standards for Criminal Justice for both Pleas of Guilty (3d ed. 1999) and Prosecution Function and Defense Function (3d ed. 1993) is an unnumbered page containing the following disclaimer: "The commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the black-letter Standards has been formally approved by the ABA House of Delegates as official policy." The commentary is then labeled "unofficial" and offered merely as a "useful explanation."

Second, the commentary to Standard 14-3.2 actually states that an attorney's failure to advise on deportation consequences is not considered ineffective assistance under the Sixth Amendment. The commentary states that "[c]ourts generally distinguish between the 'direct' and 'collateral' consequences of a plea of guilty, holding that while the defendant must

receive advice regarding the former, counsel's and the court's failure to consult with the defendant regarding the latter will not invalidate a plea." ABA Standards, Pleas of Guilty, cmt. 14-3.2(f) at 126 n.25.

As for deportation in particular, the commentary quoted a United States Court of Appeals case: "[t]he circuits that have addressed the issue of failure of counsel to inform an accused of likely deportation consequences arising out of a guilty plea have all held that deportation is a collateral consequence and therefore the failure to so advise does not amount to ineffective assistance of counsel." *Ibid.*, (quoting *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), *cert. denied*, 507 U.S. 1039 (1993)). And the commentary cited to a state-court opinion that collected state cases and held that "counsel's performance is not deficient by the mere failure to apprise a noncitizen defendant that entry of guilty plea might subject defendant to deportation." *Ibid.*, (quoting *State v. McFadden*, 884 P.2d 1303, 1305-1306 (Utah Ct. App. 1994), *cert. denied*, 892 P.2d 13 (Utah 1995)). This commentary was published along with the Standards in 1999 after AEDPA and IIRIRA.

The commentary also recognized that 14-3.2(f) is intended to be a "high standard," and that "[c]ourts do not require such an expansive debriefing in order to validate a guilty plea." *Id.*, at 126. And the commentary provided the following useful explanation: "It should be noted that this Standard requires counsel to do *more than the constitutional minimum*; it mandates that a defendant should be informed fully . . ." *Id.*, cmt. 14-3.2(b) at 120 (emphasis added).

Third, the unofficial commentary is not subjected to anything resembling the lengthy and multi-layered



process from which the actual black-letter Standards were derived, nor was it approved by the ABA's House of Delegates as were the Standards. The process for the approval of the ABA Standards has been described as follows:

[T]he Standards finally approved by the House of Delegates are the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process . . . , and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions, over three or more years. While this process is undeniably lengthy and painstaking, the final product can fairly be said to be a thoughtful, informed, and balanced reflection of the views of all relevant parts of the criminal justice system.

Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 *Crim. Just.* 4, at 14–15 (Winter 2009).

By contrast, the unofficial commentary is merely finalized by the Standards Committee after it is drafted by the task force reporter — a far less exacting process than what the Standards are subjected to, hence the disclaiming of the commentary as “unofficial.” “Indeed, ‘the Standards are a valued criminal justice asset largely because of the process through which they are created . . . . At the end of the process, the Standards represent the best thinking of the ABA.’” *Ibid.*, (quoting Irwin Schwartz, “Introduction to Criminal Justice



Standards,” in *The State of Criminal Justice 2006* (Criminal Justice Section, American Bar Association 2007), at 69). The same is not said of the unofficial commentary. For that matter, the same also cannot be said of the other sources of “prevailing norms” listed in *Padilla*, many of which simply represent the opinions of the authors or advocacy groups dedicated solely to criminal defense.

The unofficial commentary may have value in establishing a new rule, as it did in *Padilla*. But it does not carry the same weight as even the nonbinding Standards when determining whether a Sixth Amendment duty was retroactively dictated by *Strickland*. There may well have been a good reason why after such an exacting developmental process that deportation was not mentioned in the Standards.

To the extent the unofficial commentary discusses deportation, it actually instructed jurists that such advice is *not* required by the Sixth Amendment. A reasonable jurist considering the legal landscape and seeing how this Court had applied the ABA Standards in prior cases could likewise find that the commentary, while perhaps suggesting the better practice, did not dictate a unique Sixth Amendment duty to discuss deportation consequences.

One further cautionary note regarding the retroactive affect of “prevailing” norms: One sympathetic law professor asked, “If the duty was so clear,” “why isn’t the prevailing professional norm actually prevailing?” Steven Zeidman, *Padilla v. Kentucky: Sound and Fury, or Transformative Impact*, 34 Fordham Urb. L.J. 203, 206 (2011). There is no evidence that most defense lawyers, prior to *Padilla*, adhered to this unique two-tiered approach that

required “correct” deportation advice when the consequences were “truly clear” and a warning only when the law was “not succinct and straightforward.” See, e.g., *Hernandez v. State*, 61 So.3d 1144, 1145, 1150–1151 (Fla. Dist. Ct. App. 2011) (finding *Padilla* not retroactive, reasoning that state courts “have relied heavily on the pre-*Padilla*” rule that had been in effect “for over 22 years and has been relied upon in postconviction cases and appeals during that period”), review granted, 81 So.3d 414 (Fla. 2012).

C. *Padilla* broke new ground.

1. *Padilla* was the first time this Court considered whether counsel had a Sixth Amendment duty to inform a defendant of any collateral consequence, let alone deportation. The rules it announced therefore have characteristics consistent with rules this Court has previously found to have broken new ground. For example, in *Beard v. Banks*, 542 U.S. 406, 416 (2004), this Court found that the holding of *Mills v. Maryland*, 486 U.S. 367 (1988), decided eight months after Banks’s conviction became final, was supported by the holding of *Lockett v. Ohio*, 438 U.S. 586 (1978), but it was not compelled by it. That was because *Mills* was an “innovation” in how it paid “brand new attention” to individual jurors in finding unconstitutional a law that required juries to disregard mitigating factors that it considered but did not find unanimously. *Lockett* had found unconstitutional a statute forbidding a sentencer from considering certain mitigating factors. Despite *Lockett*’s obvious support for *Mills*, this extension of its rule to a jury’s consideration of mitigating factors was

not necessarily mandated by *Lockett*. Therefore, *Mills* was found to have broken new ground, thus announcing a new rule for retroactivity purposes. See *Banks*, 542 U.S. at 408, 410, 414.

Likewise, despite the support derived from *Strickland* by *Padilla*, it was surely an innovation to require under the Sixth Amendment that correct advice be given regarding deportation when the law is "truly clear" but only a warning when the law was "not succinct and straightforward." This brand-new attention paid to any collateral consequence under the Sixth Amendment, let alone the specific collateral consequence of deportation, was at least as groundbreaking as *Mills*.

Also telling that the *Padilla* Court was breaking new ground was its need to make a preliminary ruling pertaining to collateral consequences. Only after finding deportation "uniquely difficult to classify," did the Court carve out a special exception for deportation, while still leaving open whether other collateral consequences are required under *Strickland*. 130 S. Ct. at 1482. If this Court were simply treading established ground and routinely applying *Strickland* there would have been no need for a preliminary ruling on collateral consequences that carved out an exception for deportation. *Padilla*'s specialized treatment for deportation is not even suggested in *Strickland*, nor its progeny, especially its two-tiered approach distinguishing between when to give "correct advice" and when a mere warning will suffice. See *Padilla*, 130 S. Ct. at 296.

2. Petitioner's suggestion that *St. Cyr* had already broken this ground should be rejected. That case dealt with neither *Strickland* nor the Sixth

Amendment. Rather, in *dicta* the 5–4 ruling in *St. Cyr* merely referred to the general statements in the unofficial commentary to ABA Standard 14-3.2 in a footnote. See 533 U.S. at 323, n.48. *St. Cyr* addressed the retroactive effect of the statutory restriction on the Attorney General’s ability to waive deportation under AEDPA and IIRIRA, not the effectiveness of counsel. See *id.*, at 316–326.

3. The *Padilla* majority itself seemed to recognize it was breaking new ground. The opinion acknowledged that “we must be especially careful about recognizing *new grounds* for attacking the validity of guilty pleas.” *Id.*, at 1485 (emphasis added). And near the end of the opinion the Court declared that “we *now* hold that counsel must inform her client whether his plea carries a risk of deportation.” *Id.*, at 1486 (emphasis added). This Court’s use of the words “new grounds” and “now” in announcing its rule is an unmistakable signal that it broke new ground and was hence announcing a new rule. The opinion also discussed this new rule’s benefits to plea bargaining caused “[b]y *bringing* deportation consequences into this process[.]” *Id.*, at 1486 (emphasis added). This suggests that deportation consequences had yet to be brought into (and were not yet part of) the plea-bargaining process as a Sixth Amendment requirement.

4. In light of all this, it is not surprising that an article published by the ABA and co-authored by Professor Chin (one of the co-authors relied on in *Padilla*) began by declaring, “In *Padilla v. Kentucky*, . . . the U.S. Supreme Court broke new ground . . . .” Margaret Love and Gabriel J. Chin, *The “Major Upheaval” of Padilla v. Kentucky, Extending the Right to Counsel to the Collateral Consequences of*

*Conviction*, Criminal Justice, Vol. 25 No. 2 (Summer 2010). The article then noted that *Padilla* was the first time the Court has applied *Strickland* to a collateral consequence. *Ibid.*

**D. *Padilla* imposed substantial new obligations on the States.**

1. *Padilla* has already imposed on the state and federal criminal-justice systems the obligation of litigating ineffective assistance of counsel claims based on a two-tiered standard that did not previously exist. This obligation will surely multiply exponentially if this new test applies retroactively to cases that had already been final when *Padilla* was decided.

"Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our system of criminal justice." *Teague*, 489 U.S. at 310. Indeed, "the interests of comity and finality" are "significant and compelling" considerations in the criminal context. *Ibid.* "Without finality, the criminal law is deprived of much of its deterrent effect." *Ibid.* "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *Hill*, 474 U.S. at 58 (internal quotation marks and citations omitted). Regardless of the percentage of convicted aliens who will ultimately get their guilty pleas vacated, the flood of claims will impose significant additional demands on all parts of already overburdened criminal-justice systems. The number of aliens who have pleaded guilty to a



deportable offense since *Strickland* was decided surely must number in the tens of thousands.<sup>2</sup>

Of course, “the concern with finality served by the limitations on collateral attack has special force with respect to convictions based on guilty pleas.” *United States v. Timmreck*, 441 U.S. 780, 784 (1979). “The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.” *Hill*, 474 U.S. at 58 (internal quotation marks and citations omitted). The concern here is not to protect against the possible conviction of the innocent. “[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea[.]” *ibid.*, “which usually rest[s], after all, on a defendant’s profession of guilt in open court.” *United States v. Dominguez Benitez*, 542 U.S. 74, 82–83 (2004). An innocence concern is rarer still when the claim is alleging unknown deportation consequences.

Indeed, “[t]he costs imposed upon the State[s] by retroactive application of new rules of constitutional law . . . generally far outweighs the benefits of this application.” *Teague*, 489 U.S. at 310 (internal quotation marks and citation omitted). In addition to “the States’ interest in finality,” *Teague*’s nonretroactivity principle “protects . . . the reasonable judgments of state courts[.]” *Banks*, 542 U.S. at 412–413. “State courts are understandably frustrated

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<sup>2</sup> There were 94,724 non-citizens held in state or federal prisons in 2008 alone. Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, Prison Inmates at Midyear 2008, Table 20, *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1593>.



when they faithfully apply existing constitutional law only to have a federal court discover . . . new constitutional commands." *Teague*, 489 U.S. at 310 (internal quotation marks and citation omitted).

The full retroactivity of new rules like *Padilla* "*continually* forces the States to marshal resources in order to keep in prison defendants whose trials [or guilty pleas] and appeals conformed to then-existing constitutional standards." *Ibid.* As such, "the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions[.]" *Ibid.*

The passage of time will unquestionably increase the difficulty of trying these cases, which means retroactive application of *Padilla*, will likely prevent the prosecution of already-admitted-guilty aliens. This will bestow upon them the unjustified windfalls of allowing them to avoid the rest of their sentences, leaving them without a much-deserved criminal record, and leaving them without what would often be legitimate grounds for removal. Such a retroactive application could extend to cases thought to be final decades ago.

2. *Padilla* also imposed the obligation on state attorneys and state criminal judges to become proficient in civil federal immigration law. Amici States are unaware of any other instance where a federal criminal constitutional provision has been construed to impose on employees of the states' criminal justice systems the burden of knowing and applying civil federal statutory law.<sup>3</sup> Prior to *Padilla*, given the near unanimous acceptance of the collateral-consequences rule, it was

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<sup>3</sup> This is in contrast to the requirement that state criminal courts apply federal *constitutional* law according to the Fourteenth Amendment.

reasonable to believe that *Strickland* was not an unfunded mandate on every state criminal court and public defenders' office in the country to ensure free legal advice be given on a civil federal statute, especially in the field of deportation law.

Three facts must be kept in mind: One, most alien defendants are represented by state public defenders in state criminal court; two, this Court held just last Term in *Arizona v. United States* that "the removal process is entrusted to the discretion of the Federal Government," not state officials, 132 S. Ct. at 2506; and three, the high cost of extracting federal and civil immigration-law advice comes largely at the expense of the states' interest in the finality of its otherwise-valid criminal convictions.

A majority of criminal defendants pleading guilty across America are in state criminal court, and are represented by a state-paid and state-trained public defender specializing in the criminal law of that state. Therefore, when *Padilla* found civil deportation advice to be required, it resulted in a unique and unprecedented obligation on our nation's state public defenders and criminal judges to learn the federal removal consequences of a state conviction based on a federal civil statutory scheme. Indeed, some criminal defense authorities have recommended that attorneys should always presume the law will be found to be "truly clear" and they should ensure expert immigration advice in every case.<sup>4</sup> Of course, this expert advice will

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<sup>4</sup> See, e.g., Practice Advisory on *Padilla v. Kentucky* – April 8, 2010, Committee for Public Counsel Services, Public Defender Division, Immigration Impact Unit (committee is fifteen-member body appointed by Massachusetts Supreme Judicial Court to oversee indigent legal representation).

have to be paid for, usually by the states.

Justice Alito's concurring opinion in *Padilla* well documents the complexities facing a criminal lawyer in this context. See 130 S. Ct. at 1488–1492. In describing how “the removal process is entrusted to the discretion of the Federal Government[,]” this Court recently confirmed Justice Alito's identification of these difficulties. See *Arizona*, 132 S. Ct. at 2506. The states have different views, and have developed different state-law approaches, as to the proper role of States in reinforcing the federal prohibition on illegal immigration. (Compare Br. of New York et. al in *Arizona v. United States* with Br. of Michigan et al. in *Arizona v. United States*). But even those States that have chosen to supplement the federal prohibition through their own laws have adopted measures under which they look to the federal government to make the determination whether a person is lawfully present. So *Padilla* was on decidedly novel ground in requiring state courts to determine, as a matter of federal constitutional law, whether a person will become not just unlawfully present, but actually removable by federal authorities.

In addition to *Padilla*'s new obligation on state public defenders to give correct advice on federal removability questions, it also now requires the states' judiciaries to become well versed enough in removal consequences to be able to determine whether a statute is truly clear in order to ascertain the amount of advice required of counsel under the Sixth Amendment. See Cesar Cuauhtemoc Garcia Hernandez, *When State Courts Meet Padilla: A Concerted Effort Is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 Loy. J. Pub. L. 299,

304 (2011) (exploring “the repercussions of *Padilla*’s enlistment of state courts into the realm of crime-based removal”).

“Only by comparing the defense attorney’s advice to their own determinations of immigration law can state courts properly measure the competency of a defense attorney’s representation.” *Ibid.* In fact, this “categorization of a plea as one that does or does not clearly result in deportation” is now “the critical determination” a judge must make. *Id.*, at 309. After *Padilla*, state courts had to “become sufficiently well versed in immigration law” that they could “properly reach such determinations.” *Ibid.*

Even before determining what the “correct advice” may be, deciding the threshold issue of “whether deportation is a ‘clear’ consequence of pleading guilty to a particular offense is no small task.” *Id.*, at 307. “Indeed, numerous practice guides recognize the difficulty of determining the precise consequences of a particular conviction.” *Ibid.* Most state criminal judges are ill-equipped to determine whether an attorney made a correct removal assessment. Immigration judges appointed to positions within the Executive Office for Immigration Review (EOIR), a unit within the Department of Justice, make removal determinations. These decisions are in turn reviewable by the BIA, a subunit of the EOIR, which is the immigration law appellate body with exclusive jurisdiction over removal decisions. *Id.*, at 311–312. “After *Padilla*, however, state courts must now fully engage removal provisions so as to apply the removal law that federal administrative agencies and federal courts develop.” *Ibid.* Professor Garcia Hernandez’s unmistakable conclusion is that *Padilla* imposed a new obligation on

the states. *Ibid.* Given these consequences, it was reasonable to believe that *Strickland* did not require state courts and public defenders to authoritatively determine the correct advice on removal issues. It was also reasonable to conclude that since an alien is not entitled to federal-government-paid counsel at his actual removal hearing, where his banishment from the country actually hangs in the balance, *Strickland* likewise did not require states to assume the obligation to give state-funded advice on federal immigration law during his state criminal prosecution where such civil immigration consequences are not directly at stake and would obtain only later at a federal removal proceeding upon the discretionary intervention of federal officials.

The *Padilla* majority was concerned about the consequence of defendants being removed by the federal government and its "enmeshing" with criminal convictions. 130 S. Ct. at 1480-1481. But the states have never been responsible for either physical removal from the country or its enmeshing with criminal convictions. *Padilla* unforeseeably forced state governments to absorb the financial burden of rendering free legal advice to aliens to protect them from removal, and placed the state's otherwise valid criminal convictions at risk based on counsels' mistakes in interpreting a civil federal statute. Further, any change in the removal statutes enacted by Congress must now be learned and applied by state judges and state attorneys, lest the states' criminal convictions be overruled at the expense of the states' public safety. At least some reasonable jurists would have considered this a new obligation that was not dictated by precedent.



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In sum, *Padilla* broke new ground, imposed a new obligation on the States and the Federal Government, and was not dictated by precedent. As such, it is a new rule that should not be applied retroactively to cases on collateral review.

### CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JEFFREY S. CHIESA  
Attorney General of New Jersey

FRANK MUROSKI  
Deputy Attorney General  
Attorney of Record

FRANK MUROSKI  
Deputy Attorney General  
New Jersey Division of Criminal Justice  
Appellate Bureau

of Counsel and on the Brief

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